TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 612

GREAT NORTHERN RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MINNESOTA

FILED NOVEMBER 11, 1927

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IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Petitioner,

vs.

UNITED STATES OF AMERICA, Defendant

PETITION—Filed November 12, 1926

To the Honorable Judges of the District Court of the United States for the District of Minnesota:

Great Northern Railway Company, a citizen and resident of the City of St. Paul, County of Ramsey, State of Minnesota, brings this petition against the United States of America to enjoin, set aside, annul and suspend two orders hereinafter set forth of the Interstate Commerce Commission of the United States (hereinafter called the "Commission"), dated June 17, 1925, and June 8, 1926, respectively, and purporting to fix the compensation due to petitioner under the guaranty of its earnings for the period [fol. 3] from March 1, 1920, to September 1, 1920, (hereinafter referred to as the "guaranty period"), under the terms of Sections 209 and 212 of the Transportation Act of 1920, and to restrain the defendant from acting thereunder, and thereupon petitioner alleges:

I

Petitioner is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Minnesota and a carrier by railroad subject to the Interstate Commerce Act and owning and, except during the period of Federal control hereinafter referred to, operating a railroad and system of transportation thereover in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho,

Washington and Oregon, and also owning the stock of certain subsidiary railway corporations owning railways in the United States and of certain other subsidiary railway corporations owning railways in Canada.

II

The orders complained of herein were not made upon the petition of any party and do not relate to any matters complained of in any petition before the Commission, and do not relate to transportation. The petitioner in this action has its principal operating office in St. Paul, in the said District of Minnesota, Third Division.

[fol. 4]

III

On December 31, 1917, the President of the United States took possession of said Railroad owned by petitioner and of its subsidiary companies owning railways in the United States, under the provisions of the United States Federal Possession and Control Act of August 29, 1916, (39 Stats. at L. 645), and continued to operate said railroads under said Act, and under the Federal Control Act of March 21, 1918, (40 Stats. at L. 451) until March 1, 1920, at 12:01 a. m., which period is hereinafter referred to as "Federal Control".

IV

On December 30, 1918, W. G. McAdoo, Director General of Railroads for the United States, entered into a contract with the petitioner and its said subsidiary companies owning railways in the United States fixing the annual compensation to be paid to said companies under Section 1 of the Federal Control Act of the United States.

V

Prior to March 15, 1920, petitioner and said subsidiary companies owning railways in the United States filed with the Commission a written statement that it and they accepted all the provisions of Section 209 of the Transportation Act of 1920.

VI

During the guaranty period petitioner made application to the Commission for advances of certain sums in the [fol. 5] amounts hereinafter named, which were necessary to enable it to meet its fixed charges and operating expenses, and the Commission accordingly, on the following-named dates, certified to the Secretary of the Treasury the following amounts in which and the following times at which such advances might be made:

Number of certificate	Date of certificate and for payment	Amount
A-65	June 25, 1920	$3,000,000
A-225	Aug. 31, 1920	$2,000,000
A-276	Nov. 4, 1920	$1,500,000

Said amounts were not in excess of the estimated amount necessary to make good to petitioner the guaranty provided for in Section 209 of the Transportation Act.

VII

On June 30, 1920, before receiving any of the payments mentioned in paragraph VI hereof, petitioner executed a contract with the Secretary of the Treasury of the United States, to the effect that upon final determination of the amount of the guaranty provided for by said Section 209 of the Transportation Act of 1920 it would repay to the United States any amounts received by it from such advances under Section 209 (h) in excess of said guaranty, with interest at six per cent per annum from the time such excess was paid. The said Secretary of the Treasury directed petitioner to secure its performance of said contract [fol. 6] by executing and delivering to him its promissory notes in the respective amounts of said payments and by pledging with him to secure the payment of said notes and the performance of said contract, Liberty bonds in the amounts hereinafter designated, and petitioner thereupon deposited and pledged with said Secretary of the Treasury Liberty bonds owned by it of the issues and amounts below stated to secure its performance of said contract.

Date of deposit	Face value of bonds	Issue
July 2, 1920	$900,600	Fourth 4¼%
Sept. 13, 1920	$500,000	Fourth 4¼%
Nov. 18, 1920	$225,000	Second Liberty Loan Convertible 4¼%

Said contract with the Secretary of the Treasury provided that in the event of default of repayment by petitioner of any sum due thereunder, the Secretary of the Treasury, or his agents, should have the right to sell and dispose of the said Liberty bonds, either at a private or public sale, with or without notice. Said contract further provided that if, upon the final determination by the Commission of the amount of guaranty due to the petitioner, it should be found that the advances received by petitioner under Section 209 were less than or did not exceed the amount of the guaranty, the Secretary of the Treasury would release said Liberty bonds.

[fol. 7] VIII

The Commission on the 18th day of October, 1920, in a proceeding entitled "In the Matter of Settlements with Carriers under the Provisions of Section 209 of the Transportation Act of 1920", ordered all carriers which had accepted the provisions of said Section 209 to file with the Commission true and correct returns to a questionnaire and form of claim accompanying said order, which returns were to be the basis for settlements under said Section 209. Pursuant to the requirements of said order, and in the form of claim therein provided for, petitioner filed, on the 11th day of February, 1921, its duly verified return showing that $14,333,340.54 was one-half of its standard return as above defined, and therefore one-half of the annual compensation fixed by its said contract under the Federal Control Act, and that the amount of increase in such compensation provided for in Section 4 of said Act was $509,217.46. Said return further showed that petitioner had an operating deficit during the guaranty period amounting to $3,655,833.67. The total amount claimed to be due petitioner in said return, without deduction for advances theretofore

made, was the sum of $18,498,391.67, making the amount remaining due to petitioner in final settlement, after deduction of advances theretofore made, the sum of $11,998,-391.67.

[fol. 8] Thereafter and on March 1, 1921, and in accordance with Section 212 of the Transportation Act (as added by the Act of February 26, 1921, 41 Stats. at L. 1145), the Commission, not then being able finally to determine the whole amount due to petitioner under said Section 209, nevertheless definitely ascertained that the sum of $6,000,000 was due to petitioner under said Section 209 in addition to the payments above mentioned and in addition to any further sums that might later be determined upon, and thereupon said Commission issued its certain certificate to that effect, a copy of which is hereunto attached and marked "Exhibit A." Petitioner thereupon presented said certificate to the Secretary of the Treasury and received its payment of $6,000,000 in accordance therewith.

X

On the 15th day of December, 1921, in a proceeding entitled "In the Matter of Final Settlement under Section 209 of the Transportation Act," said proceeding being Finance Docket No. 1606, the Commission fixed December 31, 1921, as the date on which all accounts pertaining to the guaranty period should be considered closed for the purpose of computing the guaranty, and all carriers entitled to a guaranty were directed to file, on or before March 1, 1922, (which time was later extended by the Commission in the case of petitioner until and including June 15, 1922), [fol. 9] final statements of amounts due them on forms prescribed in said order. Thereafter and on the 15th day of June, 1922, petitioner filed a statement of claim as required by said order, claiming as the total amount of its guaranty the sum of $17,599,756.42, and as the balance remaining due, after deducting the advances already received, the sum of $5,099,756.42. Petitioner protested against the form of the return and the formulas prescribed by the Commission in said order, to the extent that they embodied the errors hereinafter referred to. Thereafter petitioner's said claim for balance due to it was revised in conference with the

Commission's representatives, and reduced to the sum of $17,421,650.35, leaving a balance claimed by petitioner of $4,921,650.35, which claim was pending before the Commission at the time of its subsequent orders hereinafter referred to. Petitioner in said conference before the Bureau of Finance of the Commission and in the hearings before Division 4 and before the entire Commission hereinafter referred to, protested that the Commission's certificate of March 1, 1921, definitely ascertaining that the sum of $6,000,000 was due to petitioner, was a final determination of the minimum amount due to petitioner to the extent of the sum so ascertained, and that the Commission was without jurisdiction to consider any reduction in said sum or to consider any question at all in said proceedings other than the question as to what additional sum, if any, should be certified as due to petitioner over and above the sum of $12,500,000 theretofore paid.

[fol. 10] On June 17, 1925, said Commission, acting without any authority therefor, but purporting to act under authority of paragraph (g) of Section 209 of the Transportation Act, wrongfully and unlawfully determined that the total amount due to petitioner under said Section 209 (including amounts of $75,698.89 and $31,418.88 due, respectively, to the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, and to the Farmers Grain & Shipping Company, a corporation of the State of North Dakota, for which companies the Commission then claimed that petitioner was the duly authorized agent for the purpose of making settlements under Section 209), was the sum of $11,178,887.31, and that there was due to the United States from petitioner under Section 209 (g), a refund, in the sum of $1,321,112.69, of payments theretofore made, and the Commission thereupon wrongfully and unlawfully issued its certificate, a copy of which is hereunto attached and marked "Exhibit B," reciting that complainant was indebted to the United States in the sum of $1,321,112.69. Said Commission thereupon delivered said certificate to the Secretary of the Treasury of the United States and he thereupon demanded of petitioner that it refund and pay to the United States the said sum of $1,321,112.69, and thereby the Commission wrongfully and without any jurisdiction or authority, sought to

modify its definite ascertainment under Section 212 and to [fol. 11] reduce the amount which it had definitely ascertained thereunder was due to petitioner, and to require a large part thereof to be paid back by petitioner. The Commission's said findings and order are reported in Vol. 99 I. C. C. Reporter, page 231. The said order of the Commission was made by Division 4 thereof. Thereafter petitioner's said claim was reargued before the entire Commission. On the 8th day of June, 1926, the Commission entered its order amending the said certificate of June 17, 1925, and issuing an amended certificate, whereby it wrongfully and unlawfully determined that the total amount due to petitioner under said Section 209 of the Transportation Act, is the sum of $11,170,214.02. Said last named certificate was likewise delivered to the said Secretary of the Treasury, a copy of which said certificate is hereto attached and marked "Exhibit C."

XII

The Commission's said orders and certificates of June 17, 1925, and of June 8, 1926, were made without jurisdiction in the matter, for the reasons stated in the preceding paragraphs, particularly paragraphs VIII to XI, inclusive, the former certificate of March 1, 1921, being a final adjudication that at least the amount named therein was due to petitioner and the Commission being without authority to find or determine that a lesser amount was due. Said orders and certificates were unlawful for the additional reason that, at all times herein mentioned, the Commission has intentionally failed, omitted and refused to consider, [fol. 12] estimate, determine or certify to certain items and amounts which the law required it to consider, estimate, determine or certify, and which petitioner duly claimed, and requested the Commission to determine, and which petitioner was entitled to under the terms of said Section 209 and which would have necessitated a finding and certificate of indebtedness of the United States to petitioner under said Section 209 greatly in excess of the amounts previously paid to petitioner as aforesaid. Petitioner had not on June 17, 1925, nor on June 8, 1926, and has not now in fact been overpaid in any amount whatever under the terms of said

Section 209, or otherwise, and the payments heretofore made to it are not in fact in excess of the amounts necessary to discharge the obligations of the United States to petitioner under Section 209, but on the contrary the Commission's certificate of March 1, 1921, as well as its certificates of June 17, 1925, and June 8, 1926, each greatly understated the amounts due to petitioner. The items and amounts which the Commission failed and refused to consider, estimate, determine or certify as aforesaid are more specifically stated and described in the following paragraphs.

XIII

The petitioner and its subsidiary corporations owning railways in Canada (herein called "Canadian subsidiaries") and five of its subsidiary corporations owning railways in the United States (herein called "American [fol. 13] subsidiaries") are herein sometimes referred to as "consolidated companies," the reasons for grouping said companies together in such statements being as follows: At the time of making the said contract of December 30, 1918, with the Director General, the petitioner owned the stock of eight Canadian subsidiaries and of nine companies owning railways in the United States, the last named nine companies all being parties to the said contract of December 30, 1918, with the Director General. Four of said last named companies kept separate accounts and made separate reports to the Commission and are, therefore, excluded from the following statements. The remaining five of said companies (being those above designated as "American subsidiaries") and the said Canadian subsidiaries (forming the group which with petitioner is above designated as the "consolidated companies") were at all times herein mentioned operated as a part of petitioner's system of transportation and in conjunction with petitioner's line of railway and under a unified system of operation, their railways all being interconnected. Their revenues and expenses were included in petitioner's accounts with its own revenues and expenses, and without segregation, for the three years ended June 30, 1917, (hereinafter called the "test period"), as well as for the guaranty period, and were fully reflected in petitioner's aver-

age net railway operating income (herein called "standard return") for the test period. The properties of petitioner and of all of said American subsidiaries were under Fed-
[fol. 14] eral control during the full period thereof. The said contract of December 30, 1918, with the Director General provided that the petitioner would cause the lines of said Canadian subsidiaries to be operated during Federal control, in conjunction with the balance of petitioner's system of transportation, as had theretofore been done; that petitioner would vote its stock in said companies as directed by the Director General; that petitioner would cause the Boards of Directors of said companies to elect such officers or agents as the Director General should direct; that whenever practicable, the officers, agents and employes of the Director General engaged in operating the petitioner's system of transportation should perform like services for the said Canadian subsidiaries; and that the annual compensation to be paid to petitioner should be its standard return, as above defined, and as finally determined by the Commission, and that in addition thereto, the Director General would pay to petitioner or for its account, the same amount of operating expenses, taxes and other similar charges (including interest upon amounts expended for additions, betterments and road extensions) that he would have to pay if said Canadian subsidaries were located in the United States and were parties to said contract of December 30, 1918, and were under Federal control, and that petitioner would pay to the Director General of Railroads an amount equivalent to the railway operating revenues of said Canadian subsidiaries during Federal control.
[fol. 15] The Commission in making all of its certificates and payments hereinabove referred to, determined that, for the purpose of fixing the amount of the guaranty of the petitioner and its said American subsidiaries under Section 209 of the Transportation Act of 1920, their net railway operating income, together with that of the Canadian subsidiaries, should remain consolidated for both the test period and the guaranty period; and that for the purpose of determining the increases in such compensation provided for in Section 4 of the Federal Control Act their investment accounts should remain consolidated for both of said periods; and that for the purpose of fixing the

amounts to be included in operating expenses for maintenance of way and structures and for maintenance of equipment under said paragraph (3) of Section 209 their operating expense accounts should remain consolidated for both of said periods. The combined net railway operating income of said consolidated companies is hereinafter referred to as the "consolidated income." The annual compensation named in the said contract of December 30, 1918, with the Director General included the compensation due to petitioner, as well as to the nine subsidiary companies which were parties to said contract. In determining the "just compensation" for petitioner and the remaining five American subsidiaries, provided for in paragraph (c)-(1) of said Section 209, the Commission determined that the annual compensation of said companies named in said contract of December 30, 1918, was one-half of the average [fol. 16] annual consolidated income for the test period, and it has determined that petitioner is entitled to the payment of said compensation for all of said companies, and has been governed by said determination in making all of its certificates hereinabove referred to. All of said consolidated companies have agreed to the determinations referred to in this paragraph without protest, except as hereinafter otherwise stated. Each of said consolidated companies has heretofore assigned to petitioner all right, title and interest in or to any and all compensation to which it is or was entitled under said Section 209.

XIV

In making its certificates above mentioned for payments due to petitioner under Section 209 of the Transportation Act, the Commission duly allowed to petitioner one-half of the said consolidated income, but failed and refused and has at all times herein mentioned failed and refused to fully determine and certify the increases in such compensation to petitioner, or to any of said consolidated companies, as provided for in Section 4 of the Federal Control Act, as it was required to do by paragraph (c)-(1) of Section 209 of the Transportation Act. On March 4, 1920, the President, acting through the Director General of Railroads, had fixed a reasonable rate per centum upon the

cost of any additions and betterments, less retirements, and upon the cost of road extensions to the property of petitioner, as required by Section 4 of said Federal Control [fol. 17] Act, at the rate of four per cent per annum (except that the rate of six per cent was fixed by him in the case of new equipment and betterments to equipment) upon the cost of additions and betterments, or road extensions made by petitioner or its said subsidiaries with the approval of or by order of the President during the period of Federal control. Prior to the period of Federal control, the petitioner and said consolidated companies had expended certain sums on account of new equipment and betterments to equipment and for other additions and betterments and extensions to their roads, which said additions, betterments or extensions had not been completed or put into operation and had not formed a part of the operated property of any of said consolidated companies until after the commencement of Federal control, and all of which were completed and put into operation during Federal control, with the approval of or by order of the President, acting through the Director General of Railroads, and petitioner duly claimed the additional compensation therefor, as provided by law. Notwithstanding the foregoing facts, the Commission, with full knowledge of said facts, deliberately and intentionally failed and refused, in making its said certificates of June 17, 1925, and June 8, 1926, to determine the amount of such additional compensation, or to credit petitioner, or any of its subsidiaries, with or to allow them any interest or compensation whatever upon any sums expended prior to Federal control, or to determine the amount [fol. 18] thereof. On the contrary, the Commission found, and it expressly declared in its said decision of June 8, 1926, as follows:

"Under the contract between the carrier and the Director General the carrier waived interest on cost of additions and betterments made by the corporation and uncompleted December 31, 1917."

There was in fact no such waiver in said contract between petitioner and the Director General, and the Commission in taking its action referred to in this paragraph was governed by an erroneous conclusion of law as to the legal

effect of said contract. Petitioner is entitled to a payment from the United States, under said Section 209, in addition to all payments found by the Commission to be due to it, in the sum of $157,187.52, on account of the facts alleged in this paragraph.

XV

Paragraph (f)-(3) of said Section 209 requires the Commission to make to petitioner and to said American subsidiaries, an allowance for expenses of maintenance of their property, to-wit, for maintenance of way and structures embraced in that property and for maintenance of equipment embraced in that property during the guaranty period which shall, so far as practicable, apply the rule set forth in the proviso to paragraph (a) of Section 5 of the standard contract between the United States and the carriers, and said Commission, in its said order of October 18, 1920, required petitioner to set up its maintenance expenses [fol. 19] for the guaranty period in accordance therewith. Said paragraph (a) of said Section 5 is identical with the corresponding paragraph in said contract of December 30, 1918, with petitioner and reads as follows:

"Sec. 5. (a) During the period of Federal control the Director General shall, annually, as nearly as practicable, expend and charge to railway operating expenses, either in payments for labor and material or by payments into funds, such sums for the maintenance, repair, renewal, retirement, and depreciation of the property described in paragraph (a) of section 2 hereof as may be requisite in order that such property may be returned to the Companies at the end of Federal control in substantially as good repair and in substantially as complete equipment as it was on January 1, 1918; Provided, however, that the annual expenditure and charges for such purposes during the period of Federal control on such property and the fair distribution thereof over the same, or the payment into funds of an amount equal in the aggregate (subject to the adjustments provided in paragraph (c) and to the provisions of paragraph (e) of this section) to the average annual expenditure and charges for such purposes included under the accounting rules of the Commission in railway operating expenses

during the test period, less the cost of fire insurance included therein, shall be taken as a full compliance with the foregoing covenant."

[fol. 20] Paragraph (c) referred to in the above proviso reads as follows in both of said contracts:

"(c) In comparing the amounts expended and charged under the provisions of paragraphs (a) and (b) of this section with the amounts expended and charged during the test period, due allowance shall be made for any difference that may exist between the cost of labor and materials and between the amount of property taken over and the average for the test period, and, as to paragraph (a), for any difference in use between that of the test period and during Federal control which in the opinion of the Commission is substantial enough to be considered, so that the result shall be, as nearly as practicable, the same relative amount, character, and durability of physical reparation."

The property described in paragraph (a) of Section 2 of said contract of December 30, 1918, included the said railways of petitioner and its American subsidiaries.

The Commission determined, and used in making said certificates of March 1, 1921, June 17, 1925, and June 8, 1926, certain ratios to be applied to the test period expenditures of the consolidated companies, in order to make allowance for differences which it found to exist between the cost of labor and material in the test period and the guaranty period, and between the amount of property maintained in the guaranty period and the average for the test period, and for differences in use of such property, which it found to exist in substantial amounts, between the test [fol. 21] period and the guaranty period. But the Commission in determining the amount of said allowance to petitioner and in making said certificates, applied said ratios to the expenditures of the consolidated companies for maintenance during one-sixth of the entire test period, and not during the same months of the years of the test period (hereinafter called the "guaranty months") as were embraced in the guaranty period. The expenditures which must be made for maintenance vary greatly on every railroad as between the guaranty months and the remaining

months of the year. In the case of the consolidated companies, one-sixth of the test period expenditure for maintenance amounted to the sum of $9,385,841.51, whereas the average expenditure for maintenance during the guaranty months of each of the three years of the test period was $10,876,494.01. Climatic and operating conditions necessitated a corresponding and similar variation between the guaranty months and the remaining months of the year, in every year of the test period as well as in each year of Federal control and in the year of the guaranty period, on the properties of the consolidated companies, and a similar variation, differing only in degree, on all railroads. In order to make an allowance for maintenance expenditures in the guaranty period, which should provide as nearly as practicable the same relative amount, character and durability of physical reparation in the year of the guaranty period as in the average of the years of the test period, and in the months of the guaranty period as in the guaranty [fol. 22] months of the test period, by means of the adjustments provided for in paragraph (c) of Section 5 of said standard contract, it was necessary to take as a base on every railway, and particularly on the railways of the said consolidated companies, the average maintenance expenditures of the guaranty months of each year of the test period, and petitioner used such base in filing its said claim with the Commission on February 11, 1921, as aforesaid. Taking one-sixth of the entire test period maintenance expense as a base and applying the said adjustment ratios determined by the Commission, produces a maintenance allowance for the guaranty period in excess of needs in the case of some railways and far below the needs in the case of other railways, and produces an unreasonable distortion of the allowances intended by the statute. One-sixth of the maintenance expenditures of the entire test period bears no reasonable or logical relation to the requirements of railways in general or of the consolidated companies in particular for maintenance expenses during the guaranty period, and to apply the ratios determined by the Commission to such a base is wholly contrary to the spirit and intent of said Section 209 and of Section 5 of said standard contract. There was no substantial difference in the cost of labor and material or in the amount of property maintained, or

in the use of said property, as between one-sixth of the entire test period and the average of the periods included in the guaranty months of each year of the test period, and [fol. 23] the ratios determined by the Commission for differences in said matters as between the test period and the guaranty period would be substantially the same whether the comparison of the guaranty period be made with one-sixth of the test period or with the average period included in the guaranty months of each year of the test period. Applying the ratios determined by the Commission for such differences to the average maintenance expenses of the consolidated companies during the period of the guaranty months of each year of the test period, instead of during one-sixth of the entire test period, would produce an allowance to petitioner for maintenance expenses in the guaranty period $3,938,000.58 in excess of the allowance determined upon by the Commission in the manner above described. The Commission has at all times herein mentioned had full knowledge of all the facts alleged in this paragraph and the petitioner's claim based thereon, and has at all of said times deliberately and intentionally refused and failed and still refuses and fails to apply its ratios determined as aforesaid to the maintenance expenses of the petitioner or of the consolidated companies during the period of the guaranty months of the average of the years of the test period, and has intentionally and knowingly failed and refused and still fails and refuses to determine any ratios to apply to said last mentioned maintenance expenditures, or to determine what said last mentioned maintenance expenses amounted to, in order to make the adjustments provided for in said paragraph (c) [fol. 24] of Section 5 of said standard contract. In its said decision of June 8, 1926, the Commission found, and specifically declared with reference to the claim of the petitioner set forth in this paragraph, as follows:

"In any event, such a claim could not be considered, because the law definitely fixes as a base the average six months of the three year test period."

The law does not in fact fix as a base the average six months of the three year test period, and the Commission in making its determination referred to in this paragraph

was governed by the said erroneous conclusion of law as to the duties and authority imposed upon it, and acted under the mistaken assumption, not only that it was not obligated by law to fix as a base the average of the corresponding months of the test period, but that it had no discretion to adopt such a base. By the said erroneous conclusion of law petitioner has been deprived of any consideration by the Commission as to whether its discretion should not be exercised in favor of adopting as a base the comparable six months of the test period.

XVI

In determining its said ratio for differences existing between the cost of labor and material as between the test period and the guaranty period as provided for in said paragraph (3) of Section 5 of said standard contract, it was the duty of the Commission to fix, with due allowance for differences in the cost of labor and materials, an amount [fol. 25] representing the guaranty period equivalent of the expenditure for maintenance on the property of the consolidated companies during a corresponding part of the test period. The Commission undertook to perform this duty by fixing an equation factor to express the radio or resultant of the increases in cost experienced, or which should reasonably have been experienced, by petitioner during the guaranty period in respect of the same quantity of maintenance which according to its accounts it had put upon the property of the consolidated companies during a corresponding part of the test period. In order to fix this equation factor, the Commission should have based its action upon an analysis of the petitioner's own test period maintenance expenditures as shown by its accounts. But instead the Commission, acting upon an erroneous view of the law, based its action largely upon an analysis of the expenditures for maintenance during the test period upon various other railroads as shown by the accounts of such other railroads. By this erroneous process the Commission imported into its fixing of the amount of maintenance to be allowed petitioner for the guaranty period the test period conditions as to costs of labor and material and as to the proportions of different sorts of labor and material as such cost and proportions existed on various

other railroads, this being entirely beyond the intent of the standard contract as to any particular railroad and therefore entirely beyond the intent of Section 209 (f) (3). By reason of this error of law the Commission adopted an [fol. 26] equation factor or ratio of 2.45 to 1, which reflected principally maintenance conditions in the test period on other railroads, whereas if it had excluded the maintenance conditions of other railroads and had based its action upon the test period conditions of maintenance upon the property of the consolidated companies alone, the ratio or equation factor should have been not less than 2.57 to 1. The costs incurred by petitioner and by the consolidated companies and the ratio between such costs in the two periods, differed substantially from those incurred by such other companies in the following respects:

The costs of labor incurred by petitioner and by the consolidated companies were substantially lower than those incurred by such other companies in the test period and were on the same level with those of such other companies during the guaranty period (which was substantially higher than during the test period) so that the ratio of increase of such costs incurred by petitioner and by the consolidated companies from the test period to the guaranty period was much greater than in the case of such other companies. The material costs necessarily incurred by petitioner and by the consolidated companies varied materially in bo'h periods from those of such other companies, due to differences in distance from source of supply and due to different sources of supply with varying prices which are available to the different companies. Because of the foregoing facts, the ratio of increase in the cost of material necessarily incurred by petitioner and by the consolidated [fol. 27] companies from the test period to the guaranty period was substantially greater than in the case of such other companies. The said ratio or equation figure is a composite figure, being a weighted average of varying ratios applying to different items of labor and material costs. On all railroads there existed a larger ratio of increase for labor than for material as a whole and a larger ratio for maintenance of way expense and for maintenance of equipment expense as a whole. The Commission rated said varying rations applicable to individual items of cost

largely in the proportion in which the items of cost to which they applied were incurred on such other railroads in the same territory, whereas on the property of the petitioner and the consolidated companies the proportion of those items of cost which were subject to the higher ratios of increase, such as labor and maintenance of way costs, was much greater than it was on such other lines of railroad. The Commission failed to give adequate weight to the distribution of expenses and to the proportion of high ratio costs necessarily incurred on the property of the petitioner and of the consolidated companies. Petitioner based its claim filed February 11, 1921, as aforesaid, upon the increase of cost of labor and materials necessarily incurred by it and by the consolidated companies as aforesaid. The Commission knowingly, intentionally and arbitrarily refused to determine said last mentioned ratio or any ratio which would state or attempt to state exclusively the increase in such costs necessarily incurred by the peti- [fol. 28] tioner or by the consolidated companies, and reduced said radio, solely because of the fact that a smaller ratio of such increase existed in the case of such other companies. The use of the said ratio of 2.57 would produce an additional allowance to petitioner under Section 209 of the Transportation Act in excess of any allowance determined upon by the Commission or included in any of said certificates, of $1,016,700.92, if applied to one-sixth of the test period expenditures, and $1,186,520.93 if applied to the average expenditures of the guaranty months of the test period.

XVII

In computing said ratio for increase in cost of labor, the Commission considered only the increase in price paid per unit of time of employment of labor, and failed and refused to consider or determine the increase in cost of labor per unit of work accomplished. Labor on all railroads was less effective in the guaranty period than in the test period and accomplished less work in proportion to time employed in the guaranty period than in the test period, due principally to changes in rules and working conditions, brought about during Federal control. The average hours of work per man per day had been greatly reduced by the Director Gen-

eral during Federal control, and remained much less in the guaranty period than in the test period. Such time per man, used in going to and coming from work and in neces-
[fol. 29] sary interruptions to work, as was paid for by all railways in both periods, remained approximately the same amount per man per day in the guaranty period as in the test period and consequently constituted a substantially higher percentage of the total time per man paid for in the guaranty period than in the test period. Because of the foregoing facts, the increase from the test period to the guaranty period in cost of labor per unit of work accomplished on all railways, including that of the consolidated companies, was much in excess of the increase in cost of labor per unit of time. The Commission had full knowledge of the foregoing facts, but intentionally and deliberately failed and refused to consider or determine the amount of such excess. The excess in the paid-for time required to accomplish any given amount of work in the guaranty period over the paid-for time required for the same work in the test period, due to the foregoing facts, was not less than 15 per cent in the case of the consolidated companies, and entitled petitioner under said Section 209 and under paragraph 5 of said standard contract to an allowance for increase of maintenance expenses of not less than $2,000,000 in addition to all allowances considered and determined by the Commission and included in any of its said certificates. Petitioner claimed such an allowance, in its said claim filed February 11, 1921, as aforesaid, but the Commission wholly failed and refused to consider or determine said claim, or the facts alleged therein.

[fol. 30]

XVIII

On June 22, 1925, the Secretary of the Treasury of the United States demanded payment by petitioner of $1,321,-112.69 in refund of the difference between the amount paid to petitioner as aforesaid and the amount due petitioner as stated in said order of June 17, 1925. On July 8, 1926, the said Secretary of the Treasury demanded payment by petitioner of $1,329,785.98 in refund of the difference between the amount paid to petitioner as aforesaid and the amount due petitioner as stated in said order of June 8, 1926.

The Comptroller General of the United States, acting upon the supposed authority of said certificate of the Commission of June 17, 1925, and without any other authority whatsoever, did on October 26, 1925, wrongfully and unlawfully notify petitioner that all amounts due to petitioner from the United States on account of mail, freight and passenger transportation and other earnings would be withheld from payment to petitioner pending the liquidation or satisfaction of the said alleged indebtedness from petitioner to the United States, and thereupon said Comptroller General did withhold amounts which were earned by and which became due to petitioner from the United States for mail, freight and passenger transportation up to and until the 26th day of October, 1926, in the sum of more than two million dollars and refused to pay or permit the payment of said sums or any part thereof to petitioner until and unless peti- [fol. 31] tioner would enter into an agreement with the said Comptroller General for pledging of the said Liberty bonds or government securities in an equal amount with the Comptroller General to secure the refund by the petitioner to the United States of the excess of the advances and partial payments made to petitioner as aforesaid, over the amount of the guaranty as certified in the said order of the Commission of June 8, 1926 (which said excess is $1,329,785.98), with interest, in the event that the validity of the claim of the United States for said refund should be determined in this action or in any action brought against the United States to test the validity of such claim for such refund, by a court of last resort having jurisdiction of the matter or by agreement of the parties. Thereupon and solely for the purpose of obtaining said payments so withheld and under duress for the reasons above stated, petitioner entered into an agreement with the Comptroller General, a copy of which is hereunto attached and marked "Exhibit D" and made a part hereof, and did pledge and deposit with said Comptroller General bonds owned by petitioner as provided for in said agreement. If petitioner had brought actions against the United States to recover the amounts due it for said mail, freight and passenger transportation it would have required a multiplicity of actions and the United States would have pleaded a counterclaim against petitioner in said actions for the said refund

based upon the said certificate of the Commission of date [fol. 32] June 8, 1926, and petitioner is advised by its counsel that it could not have attacked said order collaterally in such actions but that an action in the nature of this proceeding now brought would have been necessary to cancel the said order of the Commission and to avoid such counterclaim. The said Comptroller General has refused and still refuses to deliver said Liberty bonds to the petitioner until the invalidity of the order of the Commission is determined by final court action. Petitioner has no other remedy for setting aside or determining the invalidity of said order.

In consideration whereof, and forasmuch as petitioner is remediless in the premises at and by the strict rules of the common law and to the end that it may obtain the relief to which it is entitled, petitioner prays that a decree be entered herein setting aside, annulling and suspending said certificate and order of June 8, 1926, a copy of which is attached hereto and marked "Exhibit C," and that defendant be restrained and enjoined from disposing of any of said Liberty bonds, and from withholding from petitioner the said Liberty bonds and the interest coupons thereon; and any thereof; and that defendant be restrained and enjoined from withholding any payments due from the United States to petitioner and from asserting the said certificate of the Commission as an offset against any such indebtedness, and that the use of said order or certificate for any purpose whatever by the United States, or any official thereof, be perpetually enjoined, and for such other [fol. 33] and further relief as justice and equity may require.

Great Northern Railway Company, by F. G. Dorety, Thomas Balmer, Fletcher Rockwood, Solicitors.

November 12, 1926.

[fol. 34] *Duly sworn to by G. R. Martin. Jurat omitted in printing.*

[fol. 35] EXHIBIT "A" TO PETITION

Interstate Commerce Commission, Washington

Finance Docket No. 501. Certificate No. A-329

Certificate of Interstate Commerce Commission under Section 209 (g), Transportation Act, 1920, as Amended by Section 212.

To the Secretary of the Treasury of the United States:

1. The Commission hereby certifies that it has this date cancelled certificate No. A-328, dated the 23rd day of February, 1921, which certified to the Secretary of the Treasury of the United States a payment of six million dollars ($6,000,000) in favor of the Great Northern Railway Company.

2. The Interstate Commerce Commission, hereinafter called the Commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, hereinafter called the carrier, is a carrier as defined in paragraph (a) of section 209 of the Transportation Act, 1920, in that it is a carrier by railroad whose railroad or system of transportation was under Federal control at the time such Federal control terminated at 12:01 [fol. 36] A. M. on March 1, 1920; that the carrier filed with the Commission on or before March 15, 1920, a written statement that it accepted all of the provisions of the said section 209.

3. The Commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of six million dollars ($6,000,000) in addition to any other sum or sums heretofore certified in favor of the carrier under section 209 of the Transportation Act, 1920, is necessary to make good to said carrier the guaranty provided by the said section.

4. The Commission hereby certifies that such amount of six million dollars ($6,000,000) cannot be reduced by further accounting or otherwise, and there may be, upon further investigation, additional amounts found due to said Great Northern Railway Company to make good to said

carrier the guaranty of section 209 of the Transportation Act, 1920, and which if, and when, ascertained by the Commission will be certified to the Secretary of the Treasury.

Dated this 1st day of March, 1921.

(S.) George B. McGinty, Secretary.

By the Commission, Division 4.

[fol. 37] EXHIBIT "B" TO PETITION

Interstate Commerce Commission, Washington

Finance Docket, No. 510. Certificate No. A-1041

Certificate of Interstate Commerce Commission under Section 209 (g), Transportation Act, 1920

To the Secretary of the Treasury of the United States:

1. The Interstate Commerce Commission, hereinafter called the Commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, The Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers are carriers as defined in paragraph (a) of section 209 of the Transportation Act, 1920; and that the carriers filed with the Interstate Commerce Commission on or before March 15, 1920, written statements that they accepted all of the provisions of said section 209 and that the two companies passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effect-[fol. 38] ing settlement under said section 209 and to receive payment of any sum or sums due them thereunder; said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The Commission has ascertained, and hereby certifies to the Secretary of the Treasury that the amount of eleven million, one hundred and seventy-eight thousand, eight hundred and eighty-seven dollars and thirty-one cents ($11,

178,887.31) is the amount necessary to make good to said carriers the guaranty provided by section 209 of the Transportation Act, 1920.

3. The Commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) an aggregate amount of six million five hundred thousand dollars ($6,500,000) as follows:

Certificate No. 65, June 25, 1920	$3,000,000
Certificate No. 225, August 31, 1920	2,000,000
Certificate No. 276, November 4, 1920	1,500,000

and as partial payment under section 209 (g) as amended by section 212, an amount of six million dollars ($6,000,000) on March 1, 1921, under certificate No. A-329.

[fol. 39] 4. The Commission hereby certifies that the amount due the United States on account of overpayment to the carrier under section 209 (h) is one million, three hundred and twenty-one thousand, one hundred and twelve dollars and sixty-nine cents ($1,321,112.69).

5. The Commission has made final determination as aforesaid of the amount of the guaranty provided by section 209 of the Transportation Act, 1920.

Dated this 17th day of June, 1925.
By the Commission, Division 4.

—— ——, Secretary.

[fol. 40] EXHIBIT "C" TO PETITION

Interstate Commerce Commission, Washington

Finance Docket No. 501.* Amended Certificate No. A-1041

Amended Certificate of Interstate Commerce Commission under Section 209 (g), Transportation Act, 1920

(Cancels Certificate No. A-1041, Dated June 17, 1925)

To the Secretary of the Treasury of the United States:

1. The Interstate Commerce Commission, hereinafter called the commission hereby certifies that the Great North-

*This certificate also embraces Finance Dockets 463 and 879.

ern Railway Company, a corporation of the State of Minnesota, The Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers are carriers as defined in subdivision (a) of section 209 of the transportation act, 1920; and that the carriers filed with the Commission on or before March 15, 1920, written statements that they accepted all of the provisions of said sec-
[fol. 41] tion 209 and that the two companies last mentioned individually filed with the commission resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under said section 209 and to receive payment of any sum or sums due them thereunder; said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The commission has ascertained, and hereby certifies to the Secretary of the Treasury, that the amount necessary to make good to said Great Northern Railway Company the guaranty provided by section 209 of the transportation act, 1920, is eleven million, one hundred and seventy thousand, two hundred and fourteen dollars and two cents ($11,170,-214.02); that the amount necessary to make good said guaranty to said Farmers' Grain & Shipping Company is thirty-one thousand, four hundred and eighteen dollars and eighty-eight cents ($31,418.88); and that the amount necessary to make good said guaranty to the said Watertown and Sioux Falls Railway Company is seventy-five thousand, six hundred and ninety-eight dollars and eighty-nine cents ($75,-698.89).

[fol. 42] 3. The commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) to said Great Northern Railway Company an aggregate amount of six million, five hundred thousand dollars ($6,500.00), as follows:

Certificate No. 65, June 25, 1920	$3,000,000
Certificate No. 225, August 31, 1920	2,000,000
Certificate No. 276, November 4, 1920	1,500,000

and as partial payment to said Great Northern Railway Company under section 209 (g), as amended by section 212, an amount of six million dollars ($6,000,000) on March 1, 1921, under Certificate No. A-329.

4. The commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the transportation act, 1920.

—— ——, Secretary.

Dated this 8th day of June, 1926.
By the Commission.

[fol. 43] EXHIBIT "D" TO PETITION

Agreement, dated the 20th day of September, 1926, by and between Great Northern Railway Company, a Minnesota corporation (hereinafter called the Railway Company), party of the first part, and the United States of America (hereinafter called the United States) by the Comptroller General of the United States, party of the second part.

Whereas the United States have asserted a claim against the Railway Company in the amount of approximately $1,329,785.98 with interest at 6% from July 8, 1926, to date of settlement, on account of payments made to the Railway Company under sections 209 and 212 of the Transportation Act, referred to as the Claim of the United States, and

Whereas liability on account of the claim of the United States is denied by the Railway Company and it is understood that an action against the United States to test the validity thereof is contemplated by the Railway Company, and

Whereas the Comptroller General of the United States (hereinafter called the Comptroller General) deems it to be his duty because of the claim of the United States to withhold from the Railway Company payments now due, or to become due, from the United States for transportation of mail, freight and passengers, etc.;

[fol. 44] Now, therefore, in order that such payments due the Railway Company for transportation of mail, freight and passengers may not longer be withheld from the Rail-

way Company, it is agreed and stipulated between the parties hereto as follows:

The Railway Company shall cause to be deposited with the Comptroller General Government securities in the principal sum of $1,625,000 and thereupon, as and when any sums shall be ascertained and allowed and become payable through the General Accounting Office (the Comptroller General), to the Railway Company, payments thereof shall forthwith be made to the Railway Company and not be withheld because of the claim of the United States.

Such Government Securities will be deposited by the Comptroller General with the Treasurer of the United States for safe keeping and as interest shall become due thereon the Comptroller General will cause such interest to be paid to or upon the order of the Railway Company or the coupons representing such interest to be delivered to or upon its order.

The Government securities deposited hereunder by the Railway Company may be withdrawn and other Government Securities equal thereto in principal amount may be substituted therefor, the Government Securities so substituted to be held hereunder in the same manner as those for which substitution was made.

The Government Securities deposited pursuant to this agreement shall be held by the Comptroller General in the [fol. 45] safe keeping of said Treasurer as aforesaid, pending the final determination of the Claim of the United States. Upon such determination, if the same be in favor of the United States, then unless the amount which shall be determined to be payable by the Railway Company shall otherwise be paid by the Railway Company within thirty days thereafter, said Securities shall be sold by the Comptroller General and the proceeds thereof together with any accrued interest thereon be deposited in the Treasury of the United States on account of the amount so determined to be payable by the Railway Company on account of the Claim of the United States. But if said final determination of the Claim of the United States be in favor of the Railway Company then the Government Securities then on deposit hereunder, together with unpaid coupons that may be thereto attached, shall be forthwith delivered to the Railway Company.

In case the amount so finally determined to be payable by the Railway Company to the United States shall be less than the then market value of the Government Securities then on deposit hereunder plus the interest accrued thereon, then the Comptroller General shall sell such an amount of said Securities as shall equal in proceeds (including accrued interest) the amount so finally determined to be payable by the Railway Company to the United States and shall deliver to the Railway Company the remainder of said Securities.

It is further stipulated and agreed that the Government Securities deposited hereunder shall be held and applied [fol. 46] solely for the purpose of this agreement and shall not be subject to or applied by the United States to any other claims or on account of any indebtedness that may hereafter be asserted against the Railway Company, or any subsidiary of the Railway Company, by the United States, or any other agency or branch of the United States Government.

For the purpose of the agreement (1) the Claim of the United States shall be deemed to have been finally determined, or a final determination thereof made, when it shall have been decided by the Court of last resort having jurisdiction thereof or shall have been settled by an agreement in writing between the parties thereto, and (2) "the then market value" on a given day of Government Securities of a particular kind held by the Comptroller General hereunder, shall be the price (exclusive of accrued interest) at which said securities shall have been sold on the New York Stock Exchange at the last sale thereof made on the last preceding day on which sales thereof shall have been made on said Exchange.

A certified copy of a decree of Court making the final determination of the Claim of the United States and/or, as the case may be, a duly attested copy of any agreement entered into between the Railway Company and the United States, whereby said claim shall be finally settled shall be deemed to be satisfactory evidence of the final determination thereof.

This agreement shall not be construed as a recognition by the Railway Company of the right of the United States [fol. 47] to withhold from the Railway Company the pay-

ment of any moneys on account of the Claim of the United States, nor as an admission by the Railway Company of the validity of said claim or of any claim that any moneys are due or will become due to the United States on account of said payments made to the Railway Company under Sections 209 and 212 of the Transportation Act.

The Government Securities deposited hereunder shall remain on deposit for the purpose of this agreement, anything herein contained to the contrary notwithstanding, and the Railway Company agrees that it will not bring any suit or action for the recovery or re-delivery to the Railway Company of said Securities or any of them or of any proceeds thereof prior to the final determination of the claim of the United States, saving and excepting such suit or action as may be necessary to or brought to determine the validity of said claim.

In the event that the determination of the Claim of the United States is delayed to such an extent that the par value of the Government Securities on deposit pursuant to this agreement shall at any time be less than a sum equal to the amount of such claim plus interest thereon computed at the rate of six per cent (6%) per annum from July 8, 1926, then, upon written notice from the Comptroller General addressed to it at its office in St. Paul, Minnesota, the Railway Company will deposit with the Comptroller General additional Government Securities, the par value of which shall be sufficient to make up such deficiency.

[fol. 48] Any commissions or other expenses payable on account of the sale of Government Securities held hereunder shall be deducted from the proceeds thereof.

This agreement shall be binding upon the successors and assigns of the parties hereto.

In witness whereof, said Great Northern Railway Company has caused this agreement to be signed in its name by its President and its corporate seal to be affixed and to be attested by its Secretary, and the United States of America has caused this agreement to be signed in its name by the Comptroller General of the United States, all as of the day and year first above written.

Great Northern Railway Company, by F. G. Dorety, Vice-President. Attest: F. L. Paetzold, Secretary. United States of America, by J. R. McCarl, Comptroller General of the United States.

The Treasurer of the United States will accept from the Comptroller General of the United States deposit of said Government Securities under the aforesaid agreement.

[File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed December 10, 1926

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, we hereby enter the appearance of the Interstate Commerce Commission, as a party defendant, and of ourselves as its counsel, in the above entitled suit.

P. J. Farrell, Daniel W. Knowlton.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed December 10, 1926

The Interstate Commerce Commission, hereinafter called the Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the petitioner's petition, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answer and says:

I

Answering the opening paragraph and paragraphs I to VI, inclusive, of the petition, the Commission admits for

the purposes of this suit that the allegations therein contained are true except that it denies that its cerificates dated June 17, 1925 and June 8, 1926, respectively issued to the Secretary of the Treasury and referred to in the opening paragraph and paragraph II, purported to fix compensation due to the petitioner under sections 209 and 212 of the Transportation Act, 1920; denies that said sections of said act provide for the fixing of compensation; and denies that said certificates are orders or acts of the Commission within the meaning of the Act of October 22, 1913, entitled "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the Fiscal Year 1913 and for Other Purposes" or within the meaning of any other act of Congress authorizing the setting aside, annulling, suspending or enjoining of orders or acts of the Commission.

[fol. 51] II

Answering paragraph VII the Commission disclaims information sufficient to form a belief as to the correctness of the allegations therein contained and therefore neither admits nor denies the truth thereof.

III

Answering paragraph VIII, the Commission admits that pursuant to its order entered in a proceeding entitled "In the Matter of Settlements with Carriers under the Provisions of Section 209 of the Transportation Act of 1920," the petitioner, on February 11, 1921, filed with the Commission a verified return purporting to show that one-half of its average annual railway operating income, hereinafter called standard return, for the three years ended June 30, 1917, hereinafter called test period, was $14,333,340.54; that the amount of increase in such compensation provided in Section 4 of said act was $509,217.46; and that petitioner had an operating deficit during the guaranty period of $3,655,833.67. Further answering said paragraph the Commission admits that the total amount claimed to be due petitioner in said return without deduction for advances theretofore made was the sum of $18,498,391.67. Except as so admitted the Commission denies the truth of each of and all the allegations contained in said paragraph.

IV

Answering paragraph IX, the Commission admits that on March 1, 1921, it issued the certificate, copy whereof is attached to the petition marked Exhibit A; admits that the petitioner presented such certificate to the Secretary of the Treasury and received payment of $6,000,000 in accordance therewith; admits and alleges that it was not then able finally to determine the whole amount due the petitioner [fol. 52] under section 209 of the Transportation Act, 1920. The Commission denies that it then, or at any time, definitely ascertained that the sum of $6,000,000 was due to petitioner under said section 209 in addition to the payments theretofore mentioned in said petition and in addition to any further sums that might later be determined upon, and denies that in and by said Exhibit A, or otherwise, the Commission issued its certificate to that effect, as alleged. The Commission on the contrary alleges that by reason of the nature of the transactions involved and of the fact, shown in the petition, that it was not then able to finally determine the total amount due the petitioner under said secion 209, it could not and did not, in and by said certificate, or otherwise, definitely make a final ascertainment that said sum of $6,000,000, or any part thereof, was due to the petitioner under said section.

V

Answering the first four sentences of paragraph X, the Commission admits the truth of the allegations therein contained. Further answering said allegations, however, the Commission alleges that the petitioner subsequently admitted that the sum of $17,599,756.42, or as revised, $17,-421,650.35, claimed by petitioner in its statement so filed with the Commission, was too high in that in its "Petition for Reargument before the Entire Commission" dated July 2, 1925, it contended that the sum of $15,705.688, there said to have been previously found by the Commission as the probable allowance, "was approximately correct and that the amount necessary to make good the guarantee under section 209 of the Transportation Act is at least $15,000,000."

As to the last sentence of said paragraph the Commission avers that the allegations therein contained are irrelevant and immaterial for the reason that, even if the Commission in and by its said certificate, or otherwise, had purported to definitely ascertain or finally determine that said sum of $6,000,000 so paid to the petitioner was the [fol. 53] minimum amount due petitioner under said section 209, which is always denied, the United States would not be foreclosed by such mistake of fact and law in the part of its agent from recovering from petitioner that part of said sum which was later found and finally ascertained to constitute an overpayment under the terms of said section. The Commission therefore neither admits nor denies the allegations contained in said last sentence of paragraph X of the petition.

VI

Answering paragraph XI, the Commission admits that the allegations therein contained are true except that it denies that its acts therein referred to, or any of them, were or was wrongfully, or unlawfully performed or without jurisdiction or authority in the premises. The Commission alleges on the contrary that it did have jurisdiction and authority to perform each of and all the acts therein referred to and that it was constrained so to do by the duties imposed upon it by said sections 209 and 212 of the Transportation Act, 1920. Further answering and with a view to clarifying the allegations of said paragraph, the Commissioner alleges that in its said certificate of June 8, 1926, Exhibit C, naming the sum of $11,170,214.02 as due the petitioner, it likewise certified that the total sum due petitioner and the two other corporations named in said paragraph, for which petitioner was the authorized agent, was $11,277,331.79.

VII

Answering paragraph XII, the Commission denies each of and all the allegations therein contained. Further answering said paragraph the Commission alleges that the aggregate of the payments named as due the petitioner in

the Commission's certificates issued prior to June 17, 1925, exceed the amounts necessary to discharge the obligations of the United States to petitioner under sections 209 and 212 of the Transportation Act, 1920, in the amount shown by the certificate of June 8, 1926; and that the certificate of March 1, 1921, did not and does not constitute a final adjudication that the amount named therein was due to petitioner.

[fol. 54] VIII

Answering that portion of paragraph XIII down to and including the words "The properties of petitioner and of all of said American subsidiaries were under Federal control during the full period thereof" the Commission admits the truth of the allegations therein contained.

Answering that portion of paragraph XIII following the words above quoted down to and including the words "Railway operating revenues of said Canadian subsidiaries during Federal control," the Commission admits that the allegations therein contained are substantially correct, except that it denies that the compensation provided for by petitioner's said contract with the Director General of Railroads included interest upon amounts expended for additions, betterments and road extensions for any period other than the period from January 1, 1918, to March 1, 1920, inclusive. For exact and definite information in respect of the provisions of said contract, the Commission respectfully refers the court to the certified copy thereof hereto attached marked Exhibit A.

Answering that portion of paragraph XIII following the words last above quoted down to but not including the last two sentences in said paragraph, the Commission admits and alleges that, in certifying the payments therein referred to, its determinations in respect of net railway operating income, increases provided for by section 4 of the Federal Control Act and amounts to be included in operating expenses under paragraph (3) of section 209 of the Transportation Act, 1920, attributable to the petitioner's operation during the test and guaranty periods, were made in a manner consistent with the petitioner's said contract with the Director General of Railroads, as is required by sections 209 and 212 of the Transportation

Act, 1920, and that the annual compensation named in said contract included the compensation due to petitioner as well as to the nine subsidiary companies which were parties to said contract. Except as so admitted, the Commission denies the truth of each of and all the allegations contained in said portion of paragraph XIII and expressly denies that it made any determination of just compensation [fol. 55] under paragraph (e), (1) or that said paragraph, or any other paragraph of said section 209 required it to make any determination of just compensation.

Answering the last two sentences of paragraph XIII the Commission admits that the petitioner is entitled to represent in this proceeding the companies mentioned to the extent that said companies are vested with any interest under said section 209. Except as so admitted the Commission disclaims information sufficient to form a belief as to the correctness of said allegations or any of them and therefore neither admits nor denies the truth thereof.

IX

Answering paragraph XIV the Commission admits the truth of the allegations therein contained except in the following particulars:

The Commission denies that in making its certificates for payments due petitioner and the companies represented by petitioner under said section 209, it failed and refused to fully determine and include therein the additional amount provided for in section 4 of the Federal Control Act, as required to do by paragraph (e), (1) of said section; the Commission alleges that on the contrary it fully determined and included in said certificate all such additional amounts as were required or intended to be made by said section 209;

The Commission denies that said contract between petitioner and the Director General did not contain the waiver referred to in the quotation taken from its decision of June 8, 1926; the Commission alleges that on the contrary said contract contained a waiver by all of the railroads parties thereto of interest in respect of additions and betterments upon expenditures for work done prior to January 1, 1918, except to the extent that the same was allowed and included

in the compensation provided for in paragraph (a) of section 8 of said contract;

[fol. 56] The Commission denies that the petitioner is entitled to a payment of any sum whatsoever from the United States under said section 209, in addition to the payments certified to be due it in the Commission's certificate of June 8, 1926.

X

Answering that portion of paragraph XV down to and including the sentence "The property described in paragraph (a) of Section 2 of said contract of December 30, 1918, included the said railways of petitioner and its American subsidiaries," the Commission admits the truth of the allegations therein contained except that it denies that the allegation in respect of the provisions of paragraph (f), (3) of said section 209 contains a full and complete statement of the provisions of said paragraph; and for information concerning said provisions the Commission refers the court to the language of the act.

Answering the remaining portion of paragraph XV the Commission admits and alleges that in making said certificates it determined certain ratios representing allowances for differences in cost of labor and material, amount of property maintained, and use of said property, found to exist between the test period and the guaranty period and applied said ratios to maintenance expenditures during one-sixth of the entire test period and not to said guaranty months of the test period; that in its decision of June 8, 1926, it found and declared that the claim of petitioner that said ratios should be applied to said guaranty months of the test period could not be considered because the law definitely fixes as a base the average six months of the test period. The Commission denies that the law does not in fact fix as a base the average six months of the test period; denies that the use of such a base is contrary to the spirit and intent of said section 209 or of section 5 of said standard contract; denies that in making the determination referred to, it was governed by an erroneous conclusion of law or acted under a mistaken assumption of its duties under the law; denies that petitioner has been deprived of consideration by the Commis-

sion in respect of any questions of law or discretionary [fol. 57] matters within the authority of the Commission to determine. The Commission alleges that on the contrary section 209 does definitely fix an average six months of the test period as a base for comparison with the six months of the guaranty period; and that it gave full and careful consideration to the claim of petitioner that the guaranty months, instead of an average six months of the test period, should be used as such base and to all questions of law or of discretion involved in the rights of petitioner under said section. Further answering said remaining portion of paragraph XV the Commission alleges that except as above expressly admitted or denied, the allegations therein contained are, and each of them is, irrelevant and immaterial, and therefore neither admits nor denies the truth thereof.

XI

Answering paragraph XVI, the Commission admits and alleges that in determining the ratio representing the increase in price of labor and materials applied to maintenance of petitioner's property in the guaranty period, as compared with the test period, it fixed an equation factor of 2.45 to 1 to express that increase; that in arriving at said factor it gave consideration, among other things, to maintenance expenditures of the petitioner and other railroads within certain territorial bounds. Except as so admitted, the Commission denies the truth of each of and all the allegations contained in said paragraph; and in particular denies that, considered as a whole, substantial differences existed between the circumstances and conditions under which the petitioner performed its maintenance work and those obtaining generally within said territorial bounds. Further answering said paragraph the Commission alleges that said equation factor of 2.45 to 1 is somewhat higher than the territorial factor determined by it to be generally applicable to railroads within such territorial bounds and that the difference between said factors fully represent such differences as may have existed between the circumstances and conditions under which petitioner performed its maintenance work and those obtaining generally within said territorial bounds.

[fol. 58] XII

Answering paragraph XVII the Commission alleges that each of the allegations therein contained is irrelevant and immaterial and therefore neither admits nor denies that any of said allegations is true.

XIII

Answering paragraph XVIII the Commission disclaims information sufficient to form a belief as to the correctness of the allegations therein contained and therefore neither admits nor denies the truth thereof.

Except as herein expressly admitted, or alleged to be irrelevant and immaterial, the Commission denies each of and all the pertinent and material allegations contained in the petition, in so far as they conflict either with the allegations of the Commission herein contained or with the statements of fact included in the Commission's report entitled Guaranty Settlement with Great Northern Railway Company, 111 I. C. C. 318.

As a further and separate answer to said petition, the Commission alleges that its certificates of June 17, 1925, and June 8, 1926, issued to the Secretary of the Treasury, are not orders or acts of the Commission within the meaning of the act of October 22, 1913, entitled "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the Fiscal Year 1913 and for other Purposes", or within the meaning of any other Act of Congress authorizing the setting aside annulling, suspending or enjoining of orders or acts of the Commission; and that said sections 209 and 212 of the Transportation Act, 1920, do not vest the petitioner with such interest as entitles it to institute a suit against the United States in a court of equity to set aside annul, suspend or enjoin certificates issued by the Commission thereunder.

All of which matters and things the Commission is ready to aver, maintain and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by Daniel W. Knowlton, Assistant Chief Counsel. P. J. Farrell, of Counsel.

[fol. 59] *Duly sworn to by Balthasar H. Meyer. Jurat omitted in printing.*

[fol. 60] Exhibit "A" to Answer of I. C. C.

Agreement Between the Director General of Railroads and the Great Northern Railway Company and Other Corporations—December 30th, 1918

Contract Custodian's No. 1003

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[fol. 62] Preamble and Recitals

This agreement, made this 30th day of December, 1918, between William G. McAdoo, Director General of Railroads, hereinafter called the Director General, acting on behalf of the United States and the President, under the powers conferred by the proclamations of the President hereinafter referred to, party of the first part, and the Great Northern Railway Company (hereinafter called the "Company"), Duluth Terminal Railway Company, Minneapolis Western Railway Company, Minneapolis Belt Line Company, Great Northern Terminal Railway Company, and Great Northern Equipment Company, Minnesota corporations; The Duluth & Superior Bridge Company, a Wisconsin corporation; Watertown & Sioux Falls Railway Com-

pany, a South Dakota corporation; Montana Eastern Railway Company, and the Great Falls & Teton County Railway Company, Montana corporations (hereinafter called the "Companies"), parties of the second part:

Witnesseth that—

(a) Whereas by a proclamation dated December 26, 1917, the President, acting under the powers conferred on him by the Constitution and laws of the United States, by the joint resolutions of the Senate and House of Representatives bearing date April 6 and December 7, 1917, respectively, and particularly under the powers conferred by section 1 of the act of Congress approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," took possession and assumed control at 12 o'clock noon on December 28, 1917, of certain railroads and systems of transportation, including the railroads and transportation systems of the Companies and the appurtenances thereof, and directed that the possession, control, operation, and utilization of the transportation systems thus taken should be exercised by and through William G. McAdoo, appointed Director General of Railroads; and

(b) Whereas the Congress of the United States, by an act approved March 21, 1918, hereinafter called the Federal control act, has authorized the President to enter into agreements with the companies owning the railroads and systems thus taken over for the maintenance and upkeep of the same during the period of Federal control, for the determination of the rights and obligations of the parties to the agreement arising from or out of Federal control including the compensation to be received or guaranteed, and for other purposes, as in said act more fully set out, and authorized the President to exercise any of the powers by said act or theretofore granted him with relation to Federal control through such agencies as he might determine; and

(c) Whereas by a proclamation dated March 29, 1918, the President, acting under the Federal control act and all other powers him thereto enabling, authorized the Director General either personally or through such divisions, agencies, or persons as he may appoint, and in his own name or in the name of such divisions, agencies, or persons, or in

the name of the President, to agree with the carriers, or any of them, or with any other person in interest, upon the amount of compensation to be paid pursuant to law, and to sign, seal, and deliver in his own name or in the name of the President or in the name of the United States such agreements as may be necessary and expedient with the several carriers or other persons in interest respecting com- [fol. 63] pensation, or any other matter concerning which it may be necessary or expedient to deal, and to make any and all contracts, agreements, or obligations necessary or expedient and to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular the acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject thereof, the President is authorized to do and perform; and

(d) Whereas the Company is the owner of all the issued and outstanding shares (except only the qualifying shares owned by directors or trustees) of the capital stock of each of the Canadian Railway Companies (except The Midland Railway Company of Manitoba) named in paragraph (a) of Section 7 hereof (hereinfter called the "Canadian Companies"), and said Canadian Companies severally own railroads located wholly within the Dominion of Canada which form branches or extensions of the railroads of the Company, and which heretofore have been and now are operated in conjunction with, and as a part of, the Company's system of transportation; and it is the desire of all parties hereto that the unity of operation heretofore and now obtaining with respect to the lines of the Company, and the Canadian Companies shall continue during Federal control; and

(e) Whereas the Director General has found that in order to make Federal control effective, and to determine properly the mutual rights and obligations of the parties hereto, it is necessary to make provision for the continued unified operation during Federal control of the railroads of the Companies and of the railroads of the Canadian Companies; and

(f) Whereas the revenues and expenses of the Canadian Companies heretofore have been, and during the test period were, included and comprehended in the revenues and expenses of the Company, and were by it reported as its own, and the Interstate Commerce Commission has certified to the President the amounts of the average annual railway operating incomes of the said Companies (including the operating incomes of the Canadian Companies as above stated and after deducting the deficit of the Minneapolis Western Railway Company), computed in the manner provided in section 1 of the Federal control act, the aggregate of which amounts is twenty-eight million, seven hundred seventy-one thousand, three hundred sixty dollars and seventy-eight cents ($28,771,360.78), subject to such changes and corrections as the Commission may hereafter determine and certify to be requisite in order that the accounts and reports of the Companies, used by the Commission as the basis of computing said average annual railway operating incomes may be brought into conformity with the accounting rules or regulations of the Commission in force at the time of such accounting, or in order to correct computations based on such accounts or reports.

Now, Therefore, the parties hereto, of the first and second parts, respectively, each in consideration of the agreements of the other herein contained, do hereby covenant and agree to and with each other as follows:

[fol. 64] Section 1—Privity, Alterations, Definitions, etc.

Sec. 1. (a) This agreement shall be binding upon the United Sattes, the Director General and his successors, and upon the Companies, and their respective successors and assigns.

Wherever in this agreement the word "Company" is used, it shall be understood as meaning the Great Northern Railway Company; the words "Affiliated Companies" shall be understood as meaning the nine other corporations, parties to this agreement; the word "Companies" shall be understood as meaning the ten corporations, parties to this agreement; and the words "Canadian Companies" shall be understood as meaning the eight Canadian corporations named in paragraph (a) of section 7 hereof.

The rights and obligations of the Companies in this agreement contained are several, not joint. The Company owns all the stock, except directors' or trustees' qualifying shares, of all the Affiliated Companies. This agreement shall not be construed as creating any right, claim, privilege, or benefit against any party hereto, or against the Canadian Companies in favor of any state or any subdivision thereof, or of the Dominion of Canada or any province or subdivision thereof, or of any individual or corporation other than the parties hereto.

(b) The provisions of this agreement may be altered, amended, or added to by and only by mutual consent signified by instruments in writing signed by the Director General and by some officer of the Company thereto duly authorized by the Board of Directors of the Company.

(c) Wherever in this agreement the word "Commission" is used it shall be understood as meaning the Interstate Commerce Commission, acting by divisions or otherwise as authorized by law; but any party shall have the right to have the decision of any division reviewed by the Commission sitting as a whole.

(d) Wherever in this agreement the words "Federal control" are used to indicate a period of time, they shall be understood as meaning the period from 12 o'clock midnight of December 31, 1917, to and including the day and hour on which said control shall cease.

(e) Wherever in this agreement the words "test period" are used, they shall be understood as meaning the period between July 1, 1914, and June 30, 1917, both inclusive.

(f) Wherever in this agreement the words "standard return" are used, they shall be understood as meaning average annual railway operating income, computed in the manner provided in section 1 of the Federal control act, and ascertained and certified by the Commission.

(g) Wherever in this agreement, the words "Director General" are used, they shall be understood as designating William G. McAdoo, or such other person as the President may from time to time appoint to exercise the powers conferred on him by law with relation to Federal control, or

such agents or agencies as the Director General may from time to time appoint for the purpose; and wherever by this agreement any notice is to be given by the Director General, the same may be given in his name by any subordinate thereto duly authorized.

(h) Wherever the property of any of the Companies is referred to in this agreement it shall be understood as including all the property described in paragraph (a) of section 2 hereof, whether owned by or leased to the Companies, and, where the context permits, all additions or betterments thereto or extensions thereof made during Federal control; and as to all such leased property the Companies shall have the benefit of and be subject to all the obligations and provisions of this agreeemnt and shall be subject to all duties imposed by law in respect of such leased property.

(i) The descriptive words at the heads of the several sections of this agreement and the table of contents are inserted for convenience merely, and are not to be used in the construction of the agreement.

[fol. 65] Section 2—Property Taken Over

Sec. 2. The railroads and systems of transportation of the Company and of its said Affiliated Companies of which the President has taken over possession, use, control, and operation shall be considered as including:

(a) The following roads and properties:

1. The railroads of the Great Northern Railway Company commencing at Duluth, Minnesota, and Superior, Wisconsin, and St. Paul, Minnesota, and extending southwesterly to Sioux City, Iowa, and Yankton, South Dakota, and westerly through or into the states of Minnesota, South Dakota, North Dakota, Montana, Idaho, Washington and Oregon;

2. The railroad of the Duluth Terminal Railway Company located within the city of Duluth, Minnesota;

3. The railroad and bridge of The Duluth & Superior Bridge Company crossing the St. Louis River and connecting the cities of Superior, Wisconsin, and Duluth, Minnesota;

4. The railroad and bridge of the Minneapolis Western Railway Company crossing the Mississippi River and located within the city of Minneapolis, Minnesota;

5. The roundhouses, yards and other terminal facilities of the Minneapolis Belt Line Company located at or near Fridley, Minnesota;

6. The freight warehouses, stations, yards, tracks and other terminal facilities of the Great Northern Terminal Railway Company located in the city of St. Paul, Minnesota;

7. Locomotives, freight, passenger and other cars and equipment, wherever located, of the Great Northern Equipment Company;

8. The railroad of the Watertown & Sioux Falls Railway Company, commencing at Watertown, South Dakota, and extending to Sioux Falls, in said state;

9. The railroad of the Montana Eastern Railway Company commencing at Snowden and extending to Richey, Montana, with a branch from Fairview to Watford City, North Dakota;

10. The railroad of the Great Falls & Teton County Railway Company extending from Bynum, Montana, to Pendroy, Montana;

together with all branches and tracks, trackage, bridge, and terminal rights, and lines of railroad owned by or leased to and operated by any of the Companies as a part of their systems of transportation, and all other property of the Companies, with the appurtenances thereof, whether included in the foregoing list or not, the revenues of which were used, or which, if the property had been then owned by or leased to the Companies and had then been revenue bearing, would have been used, in computing the standard return of any of the Companies.

Each of the Companies reserves to itself the benefit of all leases (and of all rents and revenues accruing therefrom) of parts of its right of way, station grounds, and other property, the revenues from which under the accounting rules of the Commission in force during the test period

were properly creditable to "miscellaneous rent income" or "miscellaneous income." Each of the Companies grants to the Director General all its rights to terminate leases [fol. 66] of any part of its right of way, yards, or station grounds, and to occupy and use the premises of any such lessee when, in his judgment, the same is required for operating purposes. Each of the Companies shall have for its own benefit the right to lease for industrial sites or other purposes such portion of its right of way, yards, or station grounds, or structures thereon as are not required by the Director General for operating purposes, and to receive and enjoy the rentals therefrom, subject to the right of the Director General to cancel any such lease and to occupy the premises or structures whenever, in his judgment, the same are necessary for operating purposes. All expenses connected with any such property heretofore or hereafter leased or otherwise occupied, as in this paragraph provided, including taxes thereon which during the test period were not charged to railway tax accruals, shall be paid by the Companies while receiving the revenues therefrom.

(b) All materials and supplies on hand at midnight December 31, 1917.

(c) All balances in the account or accounts representing the total of "Net balance receivable from agents and conductors" as of midnight December 31, 1917.

[fol. 67] Section 3—Acceptance

Sec. 3 (a) The Companies accept all the terms and conditions of the Federal control act and any regulation or order made by or through the President under authority of said act or of that portion of the act approved August 29, 1916, referred to in paragraph (a) of the preamble to this agreement which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation; and they further and expressly accept the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights, at law or in equity, which they or any of them now have or hereafter can have, other-

wise than under this agreement, against the United States, the President, the Director General, or any agent or agency thereof, for compensation under the Constitution and laws of the United States for the taking possession of their property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to their business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation.

No claim is made by the Companies for compensation for the period between noon of December 28 and midnight of December 31, 1917; and the revenues of said period shall belong to the Companies, and the expenses thereof shall be paid by them, allocated in both cases as provided in paragraph (b) of section 4 hereof.

(b) The Companies, on their own initiative or upon the request of the Director General, shall take all appropriate and necessary corporate action to carry out the obligations assumed by them in this agreement or lawfully imposed upon them by or pursuant to the proclamation of December 26, 1917, or by the Federal control act.

(c) The Federal control act being in section 16 thereof expressly declared to be emergency legislation enacted to meet conditions growing out of war, nothing in this agreement shall be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of the Companies, or the method or basis of the capitalization thereof, and the recitals or provisions of this agreement shall not be used, as evidence or otherwise, by or against any party hereto in any pending or future proceeding which involves the acquisition or valuation of the property of any of the Companies or any part thereof; but nothing in this paragraph shall be taken or construed as affecting the settlement and discharge contained in paragraph (a) of this section, nor as limiting or qualifying any of the provisions of said paragraph for the purposes thereof, nor as limiting the use of this agreement as evidence in any proceeding under this agreement or under the Federal control act.

[fol. 68] Section 4—Operation and Accounting During Federal Control

Sec. 4. (a) All amounts received by the Director General under paragraph (c) of section 2 hereof and all other amounts whether received from the Companies in cash or collected or realized upon by him from current operating assets belonging to the Companies or arising from railway operations prior to midnight of December 31, 1917, shall be credited by him to the Companies; and the Director General shall, to the extent of the cash so received or realized, pany and charge to the Companies all expenses arising out of railway operations prior to January 1, 1918, including reparation claims, and, unless objected to by the Company, may pay and charge to the Companies any of such expenses, including reparation claims, in excess of the cash so received or realized. Balances of the above accounts shall be struck quarterly on the last days of March, June, September, and December of each year, and the cash balance found on such adjustments to be due either party shall be then payable and, if not paid, shall bear interest at the rate of 6 per cent per annum, unless the parties shall agree upon a different rate; except that the rate of interest on any portion of a balance found due to the Companies which is derived from cash in bank to the credit of the Companies on interest, shall be adjusted in each case independently of this contract as the parties may agree.

(b) Railway operating expenses, reparation and other claims, hire of equipment and joint-facility rents shall be allocated with reference to the time when incurred as between the period prior and subsequent to midnight of December 31, 1917, and as between the period of Federal control and the period subsequent thereto. Railway operating revenues shall be allocated as between the period prior and subsequent to midnight of December 31, 1917, in accordance with the established accrual practices of the Companies; except that where prior to midnight of December 31, 1917, the Companies' part of a service on through business had been completed or carload lots on their own lines had reached destination, the revenue of the Companies for such service shall be allocated to them; but as to classes of

traffic where in the opinion of the Director General such allocation will involve undue delay or undue absorption of accounting labor, such revenues shall be allocated in accordance with the established accrual practices of the Companies. Like methods of accruing and allocating such revenues shall be made at the end of Federal control.

(c) All expenditures made by the Director General during Federal control for additions and betterments, exclusive of equipment, or for extensions begun prior to January 1, 1918, shall be charged to the Companies, and if the completion of any such addition, betterment, or extension is approved or ordered by the Director General, the Company shall be entitled under the provisions of paragraph (d) of section 8 hereof to interest on the cost thereof from the completion of the work; but no interest (except to the extent that the same may be allowed and included in the compensation provided for in paragraph (a) of section 8 hereof) shall be due the Company upon any such expenditures for work done prior to January 1, 1918. Payments for all equipment ordered or under construction by any of the Companies prior to January 1, 1918, but delivered on or after that date, shall also be considered as expenditures made by order or approval of the Director General under paragraph (d) of section 8 hereof. Interest during construction payable under this paragraph, and also interest during construction on the cost of any additions, betterments, and road extensions made by the Companies or at their expense to the Companies' property during Federal control, shall be included in the cost of the work.

[fol. 69] (d) Cash receipts or disbursements and other items arising out of transactions which do not enter into or form a part of those used in determining the Companies' standard return shall not be received or paid by the Director General unless such transactions are negotiated or conducted by his order for account of the Companies and with the consent of the Company. When moneys are so received or paid by the Director General in connection with such corporate transactions they shall be credited or charged to the Companies. There shall be an accounting of the amounts due by or to any of the parties under this para-

graph at the end of each quarter year of Federal control, and the amount so found due shall be then payable and if not paid shall bear interest as provided in paragraph (a) of this section.

(e) All sums paid by the Director General to maintain pension funds or pension obligations or practices, and all contributions to Young Men's Christian Associations of employees, employees' savings funds, relief funds or associations, reading rooms, or health, accident, or death benefits for employees, shall be treated as a part of railway operating expenses during Federal control.

(f) All salaries and expenditures incurred by the Companies during Federal control for purposes which relate to the existence and maintenance of the corporations, or to the properties of the Companies not taken over by the President, or to negotiations, contracts, valuations, or any business controversy with the Government or any branch thereof, and which are not specially authorized by the Director General, shall be borne by the Companies; except that the expenses of valuation now being made by the Commission to the extent that they are, in the opinion of the Director General, necessary to comply with the valuation orders and other requirements of the Commission and to the cooperation of the Companies in the making of such valuation, shall be paid by the Director General as a part of railway operating expenses. If the Company is dissatisfied with the ruling of the Director General it may appeal to the Commission, whose decision shall be final.

(g) The Director General shall furnish for additions, betterments and road extensions to the Companies' property approved or ordered by him any of the materials and supplies taken over under paragraph (b) of section 2 hereof, or purchased by him and held for use in connection with the Companies' property, in so far as, in his judgment, he can do so with due regard to his own requirements. Materials and supplies so furnished shall be charged to the Companies at cost.

(h) The Director General shall at his option be substituted for the period of Federal control in the place of the Companies in respect of the benefits and obligations of con-

tracts relating to operation in force January 1, 1918 (including contracts made by subsidiaries for the use and benefit of the Companies and the right to abrogate or change and make new contracts with express companies for the period of Federal control), except as to contracts between the Companies and subsidiary companies which shall be considered and treated as arrangements or practices; and the Director General shall in like manner at his option be substituted for such period in respect of the benefits and obligations of arrangements and practices in force during the test period in regard to fuel, materials, and supplies for the operation of the property described in paragraph (a) of section 2 hereof and of any additions, betterments, and road extensions thereto, obtained from any mine, oil field, or other source of supply owned or controlled by the Companies, it being understood that under such arrangements or practices, if availed of by the Director General, he shall, to the extent necessary to offset any increase in the standard return growing out of the furnishing by the Companies or their subsidiaries, during the test period, of fuel, materials, and supplies under an arrangement or practice at less than the then cost or the then market value thereof for railroad purposes, be charged for such fuel, materials, and supplies a price expressed in dollars or cents per unit below or above the then cost or the then market value thereof for railroad purposes (as the [fol. 70] practice of the Companies may have been) in the same amount that the prices charged the Companies during the test period were below or above the then cost or the then market value thereof for railroad purposes; and at the request of the Director General or the Companies the prices for fuel or materials supplied between December 31, 1917, and the execution of this contract shall be adjusted on the foregoing basis: Provided, however, that a source of supply which the Companies had acquired to safeguard their own operations shall not be depleted or reduced for use on other transportation systems, except in cases of emergency to be determined by the Director General, in which event the quantity so used on other transportation systems shall be accounted for to the Companies at the fair value thereof: And provided further, that ma-

terials and supplies secured under contracts which the Companies had made for their own operations shall, so far as practicable, be used on the Companies' property, and that, if used on any other transportation system, materials and supplies of like character shall be furnished by the Director General for use in making such additions, betterments, and road extensions as shall be chargeable to the Companies, and shall be charged at cost under such contracts.

(i) The Director General shall pay, or save the Companies harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during Federal control, except the expenses which under this agreement are to be borne by the Companies. He shall also pay or save the Companies harmless from all rents called in the monthly reports to the Commission equipment rents or joint-facility rents, and all judgments or decree that may be recovered or issued against, and all fines and penalties that may be imposed upon, the Companies by reason of any cause of action arising out of Federal control, or of anything done or omitted in the possession, operation, use, or control of the Companies' property during Federal control, except judgments or decrees founded on obligations of the Companies to the Director General or the United States.

(j) Except as otherwise provided in this agreement the Director General shall save the Companies harmless from any and all liability, loss, or expense resulting from or incident to any claim made against the Companies growing out of any thing done or omitted during Federal control in connection with, or incident to, operation or existing contracts relating to operation; and shall do and perform, so far as is requisite under Federal control for the protection of the Companies, all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or of anything done or omitted thereunder, the forfeiture or loss by the Companies of any of their property rights, ordinance rights, or franchises, or of their trackage, lease, terminal, or other contracts involving a facility of operation; but nothing herein contained shall be construed to require the Director General to make any capital expenditure necessary to preserve a

franchise or ordinance right not heretofore availed of by the Companies. The Director General shall also save the Companies harmless from any and all claims for breach of covenant heretofore entered into by the Companies or by any predecessor in title or interest in any mortgage or other instrument in respect to insurance against losses by fire.

Nothing in this or in the preceding paragraph shall be construed to be an assumption by the Director General of, or to make him liable on, any obligation of the Companies to pay a debt secured by a mortgage or any rent under a lease, except rents which during the test period were called in the monthly reports to the Commission equipment rents and joint-facility rents and rents which under the accounting rules of the Commission in force during the test period were classified as operating expenses.

[fol. 71] The Companies shall, during Federal control, pay the rents of any property, held by them under lease or contract, described in paragraph (a) of section 2 hereof, except the rents which during the test period were, under the rules of the Commission, classified as equipment rents or joint-facility rents, and rents which were classified as operating expenses; which excepted rents shall be paid by the Director General. If the lease of, or right to use, any property described in paragraph (a) of said section 2 expires during Federal control, the companies shall, if possible, and if requested by the Director General, renew the same; the rental, however, of the property in the excepted classes above mentioned shall be paid by the Director General. The Companies shall pay the same amount of rent as was payable at the beginning of Federal control for other property, the lease of or right to use which is renewed at the request of the Director General, but any increases in the rental of such other property shall be paid by the Director General.

(k) In carrying out the provisions of paragraphs (a), (b), (c), and (d) of this section and the provisions of section 6 hereof the Director General shall not settle any claim by or against the Companies against the objection in writing of the president or of any other duly authorized officer of the Company. The conduct of all litigation before any court or commission arising out of such disputed

claims, or out of operation prior to Federal control, shall be in charge of the Director General's legal force and the expense thereof shall be paid by the Director General; but the Companies may, at their own expense, employ special counsel in connection with any such litigation.

(l) Nothing in this agreement shall be construed as inconsistent with the provision in section 10 of the Federal control act that no process, mesne or final, shall be levied against any property under Federal control, nor as a waiver by the United States of any claim that might otherwise be made by it that the rights of any state or subdivision thereof or of any individual or corporation have been abrogated or suspended by the taking over of the Companies' property or by Federal control.

(m) The Companies shall have the right at all reasonable times to inspect the books and accounts kept by the Director General relating to their property, or to the operation thereof, and the Director General shall during Federal control furnish the Companies with copies of the operating reports relating to their property, and as soon as practicable after the end of each fiscal year shall furnish to the Companies a complete list of their equipment as of the end of such fiscal year.

[fol. 72] Section 5—Upkeep

Sec. 5. (a) During the period of Federal control the Director General shall, annually, as nearly as practicable, expend and charge to railway operating expenses, either in payments for labor and material or by payments into funds, such sums for the maintenance, repair, renewal, retirement, and depreciation of the property described in paragraph (a) of section 2 hereof as may be requisite in order that such property may be returned to the Companies at the end of Federal control in substantially as good repair and in substantially as complete equipment as it was on January 1, 1918: Provided, however, that the annual expenditure and charges for such purposes during the period of Federal control on such property and the fair distribution thereof over the same, or the payment into funds of an amount equal in the aggregate (subject to the ad-

justments provided in paragraph (c) and to the provisions of paragraph (e) of this section) to the average annual expenditure and charges for such purposes included under the accounting rules of the Commission in railway operating expenses during the test period, less the cost of fire insurance included therein, shall be taken as a full compliance with the foregoing covenant.

(b) The Director General may expend such sums, if any, in addition to those expended and charged under paragraph (a) of this section (subject to the adjustments provided in paragraph (c) of this section) as may be requisite for the safe operation of the property described in paragraph (a) of section 2 hereof, assuming a use similar to the use during the test period and not substantially enhancing the cost of maintenance over the normal standard of maintenance of railroads of like character and business during said period; and the amount, if any, of such excess expenditures during Federal control shall be made good by the Companies as provided in paragraph (b) of section 8 hereof.

(c) In comparing the amounts expended and charged under the provisions of paragraphs (a) and (b) of this section with the amounts expended and charged during the test period, due allowance shall be made for any difference that may exist between the cost of labor and materials and between the amount of property taken over and the average for the test period, and, as to paragraph (a), for any difference in use between that of the test period and during Federal control which in the opinion of the Commission is substantial enough to be considered, so that the result shall be, as nearly as practicable, the same relative amount, character, and durability of physical reparation.

(d) At the request of the Director General or the Company there shall be an accounting of the amounts due by or to any of the parties under paragraphs (a) and (b) of this section at the end of each year of Federal control and at the end of Federal control.

(e) If during Federal control any of the property described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or ex-

tension thereof is destroyed or damaged otherwise than by fire or public enemies, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss; and the cost of restoration or replacement, or said value or damage, as the case may be, shall be charged to annual railway operating expenses; it being understood that extraordinary losses caused by floods, explosions, train wrecks or accidents are included in the matters covered by this paragraph, while ordinary losses due to such causes are included in the matters covered by paragraph (a) of this section: Provided, however, that if the Commission on application of the Director General or the Company and after giving due consideration to the practice of the Companies during the test period in [fol. 73] respect to such matters and to any other pertinent facts and circumstances, determines that it is just and reasonable that the said cost or value shall be apportioned or extended over a period of more than one year, this shall be done, and so much of said cost or value as may be apportioned by the Commission over the period subsequent to Federal control, shall be charged to the Companies in the final accounting at the end of Federal control and shall be paid by them.

If, during Federal control, any of the property described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged by fire, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the fire; and the cost of restoration or replacement or said value or damage, as the case may be, shall be charged to annual railway operating expenses, but the same shall not be considered a charge to such expenses for the purposes specified in paragraph (a) of this section.

In case of any such loss or damage by fire, the Director General shall, if given written notice of the requirements of any mortgages, equipment lease, or trust on the property so destroyed or damaged, make such restoration or replacement, or pay such value or damage, in such a way as to meet the requirements of such mortgage, equipment lease,

or trust in the same manner as would have been proper in applying the proceeds of insurance on such property if it had been insured by the Companies against loss or damage by fire in accordance with the terms of such instruments of lien; and a compliance with the written request of the Company in respect thereof shall be a full acquittance of any obligation of the Director General in the premises.

The foregoing parts of this paragraph are subject to the proviso that in case of loss or damage any additions and betterments made in connection with or as a part of the restoration or replacement of property damaged or destroyed and chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, shall be charged to and paid by the Companies.

The Director General shall not be liable to the Companies for any loss or damage due to the acts of public enemies.

(f) If any additions, betterments, or road extensions are made to the property taken over or any equipment is added at the expense of the Companies and with the approval or by order of the Director General during Federal control, he shall expend and charge to railway operating expenses such sums, either in payments for labor and materials or by payments into funds, as may be requisite for the proper maintenance, repair, renewal, retirement, and depreciation of such property until the end of Federal control.

(g) The Companies shall have the right to inspect their property at all reasonable times during Federal control, and the Director General shall provide reasonable facilities for such inspection.

(h) If any question shall arise, either during or at the end of Federal control, as to whether the covenants or provisions in this section contained are being or have been observed, the matter in dispute shall, on the application of the Director General or the Company, be referred to the Commission, which, after hearing, shall make such findings and order as justice and right may require, which shall be final as to the questions submitted and shall be binding on and observed by the parties hereto, except that the Di-

rector General or the Company may take any question of law to the courts, if he or it so desires.

[fol. 74] Section 6—Taxes

Sec. 6. (a) All taxes assessed under Federal or any other governmental authority for the period prior to January 1, 1918, including a proportionate part of any such tax assessed after December 31, 1917, for a period which includes any part of 1917 or preceding years and unpaid on that date, all taxes commonly called war taxes which have been or may be assessed against the Companies under the act of Congress entitled "An act to provide revenue to defray war expenses, and for other purposes," approved October 3, 1917, or under any act in addition thereto or in amendment thereof, and all taxes which have been or may be assessed on property under construction, and all assessments which have been or may be made for public improvements, chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, shall be paid by the Companies; but upon the amount thus chargeable to investment interest shall be paid to the Company during Federal control at the rate provided in paragraph (d) of section 8 hereof. Taxes assessed during construction on additions, betterments, and road extensions made by the Companies with the approval or by order of the Director General during Federal control shall be considered a part of the cost of such additions, betterments, and extensions, and shall, under the provisions of paragraph (d) of section 8 hereof, bear interest as a part of such cost from the date of the completion of such additions, betterments, or extensions. Assessments for public improvements which do not become a part of the property taken over shall bear interest from the date of the payment of such assessment.

(b) If any tax or assessment which under this agreement is to be paid by the Companies is not paid by them when due, the same may be paid by the Director General and deducted from the next installment of compensation due under section 8 hereof. If any taxes properly chargeable to the Director General have been or shall be paid by the Companies, they shall be duly reimbursed therefor.

(c) The Director General shall either pay out of revenues derived from railway operation during the period of Federal control or shall save the Companies harmless from all taxes lawfully assessed under Federal or any other governmental authority for any part of said period on the property under such control, or on the right to operate as a carrier, or on the revenues derived from operation, and all other taxes which under the accounting rules of the Commission in force December 31, 1917, are properly chargeable to "railway tax accruals," except the taxes and assessments for which provision is made in paragraph (a) of this section. The Director General shall pay or save the companies harmless from the expense of all suits respecting the classes of taxes payable by him under this agreement.

(d) If any such tax is for a period which began before January 1, 1918, or continues beyond the period of Federal control, such portion of such tax as may be apportionable to the period of Federal control shall be paid by the Director General, and the remainder shall be paid by the Companies.

(e) Whenever a period for which a tax is assessed cannot be definitely determined, so much of such tax as is payable in any calendar year shall be treated as assessed for such year.

[fol. 75] Section 7.—Canadian Companies

Sec. 7. (a) The Midland Railway Company of Manitoba, a corporation of the Province of Manitoba, Dominion of Canada, owns freight terminals within the city of Winnipeg, Manitoba, and a railroad connecting the same with the railroad of The Canadian Northern Railway Company near the southern boundary of the city of Winnipeg. It has trackage rights over the railroad of The Canadian Northern Railway Company from said point of connection to the connection between the railroad of The Canadian Northern Railway Company with the railroads of the Company and Northern Pacific Railway Company at Emerson Junction, Manitoba, near the International Boundary Line, and near the towns of Emerson, Manitoba, and Noyes, Minnesota.

The Manitoba Great Northern Railway Company, a corporation of the Province of Manitoba, Dominion of Canada, owns and operates a line of railroad extending southerly from Portage la Prairie, Manitoba, to a point on the International Boundary Line, at or near Neche, North Dakota, where it connects with the railroad of the Company; also, it owns and operates a line of railroad from Morden, Manitoba, extending southerly to a point on the International Boundary Line at or near Walhalla, North Dakota, where it connects with the railroad of the Company.

The Brandon, Saskatchewan & Hudson's Bay Railway Company, a corporation of the Dominion of Canada, owns and operates a railroad extending southerly from Brandon, Manitoba, to a point on the International Boundary Line, at or near St. John, North Dakota, where it connects with the railroad of the Company.

The Crows Nest Southern Railway Company, a corporation of the Province of British Columbia, Dominion of Canada, owns and operates a railroad extending southerly from Michel, British Columbia, to a point on the International Boundary Line, at or near Gateway, Montana, where it connects with the railroad of the Company.

The Nelson & Fort Sheppard Railway Company, a corporation of the Province of British Columbia, Dominion of Canada, owns and operates a railroad extending southerly from Nelson, British Columbia, to a point on the International Boundary Line at or near Boundary, Washington, where it connects with the railroad of the Company.

The Red Mountain Railway Company, a corporation of the Province of British Columbia, Dominion of Canada, owns and operates a railroad extending southerly from Rossland, British Columbia, to a point on the International Boundary Line at or near Velvet, Washington, where it connects with the railroad of the company.

The Vancouver, Victoria and Eastern Railway and Navigation Company, a corporation of the Province of British Columbia, Dominion of Canada, owns and operates a line of railroad, together with branches, extending from Vancouver, British Columbia, southerly to New Westminster, and thence through Colebrook to a point on the International Boundary Line at or near Blaine, Washington, where it connects with the railroad of the Company. Also, it

owns and operates a line of railroad extending easterly from Guichon, British Columbia, through Abbottsford, B. C., to a point on the International Boundary Line at or near Sumas, Washington, where it connects with the railroad of the Northern Pacific Railway Company. Also, it owns and operates a line of railroad extending easterly from Abbottsford, B. C., to a connection with the railroad of the Canadian Northern Pacific Railway Company at Cannor, British Columbia, from which point it has trackage rights over the railroad of said last named Company, to Hope, B. C. At Hope, B. C., it owns and operates a terminal and connection to the railroad of the Kettle Valley Railway Company from which point and over which road it has trackage rights to Brookmere. Also, it owns and operates a line of railroad from Brookmere, B. C., extending in a southeasterly direction to a point on the International Boundary Line at or near Chopaka, Washington, where it connects with the railroad of the Company. It also owns and operates those portions of the through line of railroad from Oroville, Washington, to Marcus, Washington, which lie north of the International Boundary Line, said portions north of the Boundary Line extending from a point near Molson, Washington, to Ferry, Washington, and from a [fol. 76] point near Danville, Washington, through Grand Forks Junction, B. C., to a point on the International Boundary Line at or near Laurier, Washington, where it connects with the railroad of the Company, together with branches extending northerly from Grand Forks Junction, to Granby, and Phœnix, B. C.

The New Westminster Southern Railway Company, a corporation of the province of British Columbia, Dominion of Canado, owns and operates a line of railroad extending northerly and southerly from Cloverdale, British Columbia, at which place its railroad connects with the railroad of the Vancouver, Victoria and Eastern Railway and Navigation Company.

(b) During Federal control each of the Canadian Companies shall continue to maintain and operate its aforesaid railroads and appurtenant properties in conjunction and cooperation with the Director General's operation of the railroads of the Company in substantially the same manner that such Canadian Company operated its railroad and

properties in conjunction and cooperation with the Company during the test period.

(c) Through train service shall be maintained over the railroads of each of the Canadian Companies and the railroad of the Company connecting therewith at the International Boundary Line. The Director General shall, out of the equipment of the Company, furnish the necessary equipment for such through train service in so far as the equipment of the Canadian Companies may not be adequate or available for such service. The Director General shall work and operate said through trains south of the International Boundary Line; and the Canadian Companies shall work and operate said through trains over their respective roads north of the International Boundary Line. Each of the Canadian Companies shall maintain such reasonable local train service as may be required to handle local traffic, or to meet legal requirements, and in so far as its equipment may not be adequate to perform such local service, the Director General shall furnish it equipment therefor out of the equipment of the Company.

(d) The Company shall pay or cause to be paid to the Director General an amount equivalent to the railway operating revenues (including hire of equipment and joint-facility rents) accruing to the Canadian Companies, during Federal control, allocated with respect to the period of Federal control, and the periods prior and subsequent thereto, in the manner as provided in paragraph (b) of section 4 of this agreement.

(e) The Director General shall pay to the Company, or shall pay to or expend for the Canadian Companies (for the account of the Company), for or on account of:

(1) Operating expenses, reparation claims, hire of equipment, and joint-facility rents, the same aggregate amount that he would be required to pay, expend, appropriate, or bear under the provisions of this agreement if the same were applicable to said Canadian Companies and the properties thereof, and said Canadian Companies were within the meaning of the term "Companies" as used herein. Said operating expenses, reparation claims, hire of equipment, and joint-facility rents of said Canadian Companies

shall be allocated as provided in paragraph (b) of section 4 hereof, and shall include all items chargeable thereto under the provisions of this agreement, including those items enumerated in paragraph (e) of section 5 hereof;

(2) Maintenance, repair, renewal, retirement, depreciation, destruction, loss and damage, the same aggregate amount he would be required to pay, expend, appropriate, or bear under the provisions of this agreement if said provisions were applicable to the Canadian Companies and the properties thereof, and said Canadian Companies were within the meaning of the term "Companies" as used herein;

(3) Taxes assessed and levied upon the properties of each of the Canadian Companies, and upon its right or privilege to operate, and/or its revenues derived from operation, and all other taxes which under the accounting rules of the Commission in force December 31, 1917, are properly chargeable to railway tax accruals, the amount thereof assessed and/or levied for the period of Federal control, allocated with respect to the period of Federal control, and the periods prior and subsequent thereto in the same manner as provided for the allocation of taxes assessed and levied against the properties of the Company for the period of Federal control; and

(4) Amounts expended for additions, betterments and road extensions, interest at the rate and upon the bases as provided in paragraph (d) of section 8 hereof.

[fol. 77] (f) The Company as the owner of all the issued and outstanding shares (except directors' and trustees' qualifying shares) of stock of each of the Canadian Companies (except the Midland Railway Company of Manitoba), and as the owner of one-half of all the outstanding stock of the Midland Railway Company (except directors' and trustees' qualifying shares) covenants that subject to the laws of the Dominion of Canada and the Provinces of Manitoba and British Columbia, it will cause the said Canadian Companies, and each of them, to do and perform all acts and things necessary to be done and performed in order to give effect to this section (section 7) of this agreement; that from time to time it will, subject to the laws

aforesaid, and to the extent necessary to make effective the provisions of this agreement, vote or cause to be voted stock owned by it in said Canadian Companies, as the Director General may from time to time in writing direct; and from time to time, and subject to said laws, it will cause the respective boards of directors of said Canadian Companies to elect or appoint as officers and agents, such persons as in writing the Director General may direct. The Company agrees to protect and hold harmless the Director General from all claims and demands of the Northern Pacific Railway Company or any other stockholders of the Midland Railway Company of Manitoba, arising or growing out of or existing because of the ownership of stock in said Midland Railway Company, or any right, title or interest in or incident to said Company or incident to the operation or use of the properties thereof or the revenues derived therefrom.

(g) In order to avoid duplication of work and expense the Director General and the Company agree whenever practicable and reasonable that the officers, agents and employees of the Director General engaged in the operation of the Company's transportation system shall perform like services for the Canadian Companies that they perform for the Director General. The Director General's accounting force shall keep and handle the accounts of the Canadian Companies in so far as they relate to operating revenues, operating expenses, taxes, equipment rentals and joint-facility rentals. For accounting purposes the said Canadian lines shall be considered as accounting divisions of the Company. The operating accounts of the Canadian lines as above described shall be kept in books of account in substantially the same manner as they were kept during the test period. The officers of the Company shall have the right to check said books of account. On the last day of each month a statement shall be prepared and submitted to each of the parties showing (1) the aggregate operating revenues (including hire of equipment and joint-facility rents) of each of the Canadian Companies for the preceding calendar month, and (2) the aggregate operating expenses, taxes, interest, reparation claims, hire of equipment and joint-facility rents of each of the Canadian Companies for the preceding calendar month, which the Director

General, by sub-paragraphs 1, 2, 3 and 4 of paragraph (e) of this section is required to pay to or expend for the Canadian Companies or to pay the Company. Any of said revenues of the preceding month accruing to the Canadian Companies or any of them remaining in the possession of the Canadian Companies or any of them, or of the Company shall be turned over to the Director General, and to the extent that the Director General shall not have already done so the Director General shall pay to the Company or shall pay to said Canadian Companies (for the account of the Company), for and on account of operating expenses, taxes, interest, reparation claims, hire of equipment and joint-facility rents to an amount as obligated by sub-paragraphs 1, 2, 3 and 4 of paragraph (e) of this section. At the request of either party there shall be an accounting of the amounts due by one party or the other under this section at the end of each year of Federal control and at the end of Federal control.

(h) This agreement shall be construed, as nearly as practicable, as securing to the Director General and the Company the same financial benefits, and as imposing upon them the same financial obligations that would accrue or rest upon them, respectively, were the properties of the Canadian Companies now, and during the test period had been, owned and operated by the Company, and covered by the provisions of this agreement.

[fol. 78] Section 8—Compensation

Sec. 8. (a) The annual compensation guaranteed to the Companies under section 1 of the Federal control act shall be the sum twenty-eight million, seven hundred seventy-one thousand, three hundred sixty dollars and seventy-eight cents ($28,771,360.78) during each year and pro rata for each fractional part of a year of Federal control, subject, however, to any increase or decrease in the standard return hereafter made by the Commission as provided in paragraph (d) of the preamble of this agreement.

Compensation paid by the Director General under this agreement, including that provided for in paragraph (d) of this section, or arising from any other source, shall be

paid to the Company; and the Company, after retaining such part thereof as it may be entitled to retain, shall distribute the remainder to the parties entitled thereto.

(b) The said compensation shall be paid to the Company quarterly in equal installments on the last days of March, June, September, and December of each year for the quarter ending therewith, except that the first three installments shall be due as of March 31, 1918, June 30, 1918, and September 30, 1918, respectively, but shall be paid upon the execution of this agreement; but from each installment there may be deducted any amount then due by the Companies under paragraphs (a) and (d) of section 4 hereof, under paragraph (b) of section 5 hereof, and under paragraph (b) of section 6 hereof, and all amounts required to reimburse the United States for the cost of additions and betterments made to the property of the Companies not justly chargeable to the United States, unless such matters are financed or otherwise taken care of by the Companies to the satisfaction of the Director General, and the Director General may apportion any such amounts to two or more subsequent installments: Provided, however, that said power to deduct amounts due or accruing under paragraph (b) of section 5 hereof and the cost of additions and betterments not justly chargeable to the United States shall not be so exercised as to prevent the Companies from paying out the sums reasonably required to support their corporate organizations, to keep up sinking funds for the Companies' debts required by contracts in force December 31, 1917, to pay their taxes, to pay rents and other amounts (not chargeable to capital account) properly payable by the Companies for leased or operated roads and properties, to pay interest which has heretofore been regularly paid by the Companies, and interest on loans issued during Federal control and approved by the Director General, nor shall such deduction be made in respect of additions and betterments which are for war purposes and not for the normal development of the Companies, nor in respect of road extensions, nor in respect of amounts due under paragraphs (a) and (d) of section 4 hereof, in cases where the current assets, including materials and supplies, of the Companies taken over by the Director General under the

provisions of this agreement clearly exceed the current liabilities of the Companies paid or assumed by the Director General under said section. In the event of a difference as to the fact whether additions and betterments are for war purposes and not for the normal development of the Companies, or as to whether an addition is a road extension, the question may, on application of the Director General or the Company, be referred to and determined by the Commission.

The power provided in this paragraph to deduct the amount due by the Companies for the cost of additions and betterments not justly chargeable to the United States is further declared to be an emergency power, to be used by the Director General only when he finds that no other [fol. 79] reasonable means is provided by the Companies to reimburse the United States, and, as contemplated by the President's proclamation and by the Federal control act; it will be the policy of the Director General to so use such power of deduction as not to interrupt unnecessarily the regular payment of dividends as made by the Companies during the test period.

Overdue installments of compensation, or balances thereof, provided for in this section shall bear interest from maturity at the rate of five per cent per annum, except that if the Director General shall, prior to the execution of this contract, have loaned the Companies any money, the installments of compensation overdue at the date of the execution hereof shall bear interest from maturity at the same rate as that charged to the Companies on such loans.

(c) During Federal control the Companies shall not, without the prior approval of the Director General, issue any bonds, notes, equipment trust certificates, stock, or other securities, or enter into any contracts, except contracts in respect of corporate affairs and property not taken under Federal control), or agree to pay interest on their debts at a higher rate, or for rent of leased roads and properties a larger amount, than the rates and amounts payable as of, or required by contracts in force on December 31, 1917. The Companies may, however, procure the authentication and delivery to them under any mortgage or trust deed or agreement in force December 31, 1917, of

bonds or notes issuable thereunder in respect of additions, betterments, extensions, and equipment, or for refunding purposes.

(d) Upon the cost of additions and betterments, less retirements in connection therewith, and upon the cost of road extensions, made to the property of the Companies during Federal control, the Director General shall, from the completion of the work, pay the Company at a reasonable rate of interest, to be fixed by him on each occasion. In fixing such rate or rates he may take into account not merely the value of money but all pertinent facts and circumstances, whether the money used was derived from loans or otherwise, provided that to the extent that the money is advanced by the Director General or is obtained by the Companies from loans or from the proceeds of securities the rate or rates shall be the same as that charged by the Director General for loans to the Companies or to other companies of similar credit.

(e) From the compensation so received or from other income, if adequate for the purpose, the Companies shall make all payments of interest, rents (other than the equipment rents, joint-facility rents, and rents classified as operating expenses mentioned in paragraph (j) of section 4 hereof), and other sums necessary to prevent a default under any mortgage or lease of any of the property described in paragraph (a) of section 2 hereof; and if at any time during Federal control the Companies, by virtue of any change in the right of possession (subject to the rights of the United States) to any of said property or otherwise, shall no longer be entitled as between themselves and any other person or corporation, not a party to this agreement, to receive the entire compensation herein provided, such compensation shall be apportioned and paid as between those entitled thereto, as justice and right may require.

[fol. 80] Section 9—Claims for Losses on Additions, etc.

Sec. 9. (a) Prompt notice in writing, except as provided in paragraph (d) of this section, shall be given the Companies of the making or ordering of any additions, betterments, or road extensions, including terminals, motive power, cars, or other equipment to or for the property of

the Companies costing more than one thousand dollars, with an estimate of the cost thereof. Such notice shall be given before the beginning of the work or the acquisition of the property whenever in the judgment of the Director General it is practicable to do so. Within a reasonable time after the completion of the work or the acquisition of the property, a written statement of the final cost thereof shall be given the Companies. There shall be furnished the Companies, as soon as practicable after the end of each month, a written statement of all expenditures estimated to cost one thousand dollars or less chargeable to investment in road and equipment made during the month, with a brief description of the work done or of the property acquired; and such statement shall constitute all the notice of additions and betterments costing one thousand dollars or less required by (b) and (c) of this section. The notices provided in this paragraph may be given to the president of the Company unless the Company designates some other officer to receive the same, in which event the notice shall be given to such other officer.

(b) Any claim of the Companies for loss accruing to them by reason of expenditures for additions and betterments made to their property during Federal control in connection with or as a part of the work of maintaining, repairing, and renewing the Companies' property and chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, except such expenditures as are incurred in connection with the replacement of buildings and structures in new locations, may be determined by agreement between the Director General and the Companies, or, failing such agreement as to the fact or amount of such loss, the questions at issue may, upon the application of the Director General or the Companies at any time after the filing of the statement of claim hereinafter referred to, be ascertained in the manner provided in section 3 of the Federal control act: Provided, however, that no loss shall be claimed by the Companies and no money shall be due them in respect of such additions and betterments upon the ground that the actual cost thereof at the time of construction was greater than under other market and commercial conditions; and for the purpose of determining such con-

troversy the amount paid for any addition or betterment shall be deemed the fair and reasonable cost thereof and shall be taken as the basis for such determination; nor unless the Companies, within sixty days of notice to them that the work will be done, shall give the Director General notice of objection thereto and shall file with the Director General a statement of claim within ninety days after notice of the completion of the work.

(c) Any claim of the Companies for loss accruing to them by reason of any additions and betterments which are not made in connection with or as a part of the work of maintaining, repairing, and renewing the Companies' property, or accruing to them in connection with maintenance in the replacement of buildings and structures in new locations, or by reason of road extensions, terminals, motive power, cars, or other equipment made to or provided for the property of the Companies during Federal control, may be determined by agreement between the Director General and the Companies, or failing such agreement as to the fact or amount of such loss, may, by proceedings instituted not later than six months after the end of Federal control, be ascertained in the manner provided in section 3 of the Federal control act: Provided, however, that no loss shall be [fol. 81] claimed by the Companies and no money shall be due to them in respect of such additions, betterments, road extensions, terminals, motive power, cars, or other equipment mentioned in this paragraph upon the ground that the actual cost thereof at the time of construction or acquisition was greater than under other market and commercial conditions; and for the purpose of determining such controversy the amount paid for any additions, betterments, road extensions, terminals, motive power, cars, or other equipment shall be deemed the fair and reasonable cost thereof and shall be taken as the basis for such determination; nor unless within sixty days after notice to the Company of such construction or acquisition written notice is given to the Director General by the Company that a loss will be claimed in respect thereof. With and as a part of such notice the Company shall state the objections to such construction or acquisition as far as reasonably practicable at the time. Nothing in this agreement shall be construed as barring the United States from contending that no loss

within the meaning of the Federal control act accrued to the Companies by reason of any additions, betterments, or road extensions made during Federal control by order or approval of the Director General, if it is made to appear that the Companies themselves but for Federal control should in the exercise of sound judgment have made such addition, betterment, or road extension.

(d) Where additions, betterments, or road extensions or terminals, motive power, cars or other equipment have been made to or provided for the property of the Companies during Federal control but prior to the execution of this agreement, the Director General shall not be required to give the notice thereof provided for in paragraph (a) of this section, and notice by the Company of any claim of loss in respect thereto may be given the Director General within ninety days after the execution hereof; and such claims shall thereafter be proceeded with in the manner provided in paragraph (b) or paragraph (c) of this section, as the case may be.

(e) The Director General shall reimburse the Companies for the amount of loss ascertained under this section with a proper adjustment of interest thereon.

(f) The Director General shall not acquire any motive power, cars, or other equipment at the expense, or on the credit, of the Companies in excess of what in his judgment is necessary, in addition to their then existing equipment, to provide for the traffic requirements of their own systems of transportation; but this provision shall not prevent the Director General, after the acquisition of such equipment, from using the same, or any part thereof, on the line of any other transportation system operated by him.

[fol. 82] Section 10—Final Accounting

Sec. 10. (a) At the end of Federal control all the property described in paragraph (a) of section 2 hereof shall be returned to the Companies, together with all repairs, renewals, additions, betterments, replacements, and road extensions thereto which have been made during Federal control, except as any part thereof may have been destroyed or retired and not replaced, in which case the provisions of section 5 hereof shall govern and except that the Direc-

tor General shall not be obliged to restore or replace property destroyed or damaged by the acts of public enemies.

(b) At the end of Federal control the Director General shall return to the Companies all uncollected accounts received by him from them and also materials and supplies equal in quantity, quality, and relative usefulness to that of the materials and supplies which he received, and to the extent that the Director General does not return such materials and supplies he shall account for the same at prices prevailing at the end of Federal control. To the extent that the Companies receive materials and supplies in excess of those delivered by them to the Director General they shall account for the same at the prices prevailing at the end of Federal control and the balance shall be adjusted in cash.

(c) The total amount of the account "Net balance receivable from agents and conductors" at the end of Federal control may be turned over by the Director General to the Company. He may also turn over all assets which have accrued out of operation; and the Company shall, to the extent of the cash received or realized from such assets, pay and charge to the Director General all expenses arising out of railway operations during Federal control, including reparation and other claims, and may, unless objection is made by the Director General, pay and charge to him any such expenses, including reparation and other claims, in excess of the cash so received or realized. On the first day of the third month following the termination of Federal control an accounting between the parties shall be had, and so on the first of each third month thereafter. Any balance found due either party shall be payable as of the date on which the account is stated and shall bear interest until paid.

(d) At the end of Federal control there shall be paid to the Companies any balance then remaining unpaid of the cash received from them at the beginning of or during Federal control, together with any unpaid interest which may have accrued upon the same. There shall also be paid to the Companies any funds created under the provisions of this agreement except to the extent that such funds may have been properly used under this agreement.

(e) Wherever under any provision of this section there is to be an adjustment of interest, it shall be at the rate of five per cent per annum, unless the parties shall in any case agree on a different rate.

(f) After Federal control no claim by or against the Director General shall be settled by the Companies against the written objection of the Director General or the Attorney General of the United States. The conduct of all litigation before any court or commission arising out of such disputed claims or out of operations during Federal control shall be in charge of the Companies' legal force and the expense thereof shall be paid by the Companies; but the Director General or the Attorney General may, at the expense of the United States, employ special counsel in connection with any such litigation.

[fol. 83] Execution

In witness whereof, these presents have, on the 30th day of December, 1918, been duly signed, sealed and delivered by William G. McAdoo, Director General of Railroads, and have, on the 16th day of December, 1918, been duly signed, sealed and delivered by the Great Northern Railway Company, Duluth Terminal Railway Company, Minneapolis Western Railway Company, Minneapolis Belt Line Company, Great Northern Terminal Railway Company, Great Northern Equipment Company, The Duluth & Superior Bridge Company, Watertown & Sioux Falls Railway Company, Montana Eastern Railway Company, and the Great Falls & Teton County Railway Company, by their respective Presidents or Vice-Presidents, and duly attested by their respective Secretaries or Assistant Secretaries, and their respective corporate seals hereto affixed; such execution and delivery on the part of said Companies having been duly authorized and/or ratified by votes of their respective stockholders and Boards of Directors at meetings duly called and held on the 16th day of December, 1918.

W. G. McAdoo, J. S. P., Director General of Railroads. (Seal.) In presence of: —— ——, Great Northern Railway Company, by Erasmus C. Lind-

ley, Vice President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Duluth Terminal Railway Company, by Ralph Budd, President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Minneapolis [fol. 84] Western Railway Company, by Ralph Budd, President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Minneapolis Belt Line Company, by Erasmus C. Lindley, Vice President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Great Northern Terminal Railway Company, by Erasmus C. Lindley, Vice President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Great Northern Equipment Company, by Erasmus C. Lindley, Vice President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. The Duluth & Superior Bridge Com- [fol. 85] pany, by Ralph Budd, President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Watertown & Sioux Falls Railway Company, by Ralph Budd, Vice President. Attest: F. L. Paetzold, Secretary. (Seal.) In presence of: —— ——. Montana Eastern Railway Company, by Ralph Budd, President. Attest: F. L. Peatzold, Secretary. (Seal.) In presence of: —— ——. Great Falls & Teton County Railway Company, by Ralph Budd, President. Attest: F. L. Paetzold, Asst. Secretary. (Seal.) In presence of: —— ——.

Pursuant to due authority, I as Custodian of the records of the United States Railroad Administration do hereby certify that the foregoing is a true copy of Agreement between the Director General of Railroads and the Great Northern Railway Company and Other Corporations dated December 30th, 1918, now a part of the files and records of the Railroad Administration in my possession.

Witness my hand and the seal of the United States Railroad Administration this 4th day of December, 1926.

A. W. Stoll, Chief Clerk for A. W. Mellon, Director General of Railroads. (Seal.)

[fol. 86] [File endorsement omitted.]

[fol. 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES—Filed January 13, 1927

First Defense

United States for the First Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The certificate and amended certificate of the Interstate Commerce Commission, Exhibits B and C, dated, respectively, June 17, 1925 and June 8, 1926, do not constitute orders within the meaning of the Commerce Court Act of June 18, 1910 (c. 309, 36 Stat. 539) and Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, 221).

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Second Defense

United States for the Second Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The prayer of the petition "that a decree be entered herein setting aside, annulling and suspending said certificate and order of June 8, 1926 * * * 'Exhibit C' * * *; that defendant be restrained and enjoined from disposing of any of said Liberty bonds, and from withholding from petitioner the said Liberty bonds and the interest coupons thereon, and any thereof; and that defendant be restrained and enjoined from withholding any payments due from the United States to petitioner and from asserting [fol. 88] the said certificate of the Commission as an offset against any such indebtedness, and that the use of said order or certificate for any purpose whatever by the United States, or any official thereof, be perpetually enjoined," * * * is in substance a prayer for a mandatory injunction against the United States without designating or indicating any officer or officers of the United States or any person or persons acting or refusing to act for and on behalf of

the United States against whom such an injunction may be issued.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Third Defense

United States for the Third Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The subject-matter of the petition relates to an accounting and settlement between the petitioner and the United States which is not and cannot be made the subject of the equitable jurisdiction of the specially-constituted District Court under the Commerce Court Act of June 18, 1910 (c. 309, 36 Stat. 539) and Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, 221) in a suit to enjoin, set aside, annul or suspend in whole or in part an order of the Interstate Commerce Commission.

Wherefore, defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Fourth Defense

United States for the Fourth Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The Commerce Court Act of June 18, 1910 (c. 309, 36 Stat. 539, 540) provides: "The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive." If the certificate and amended certificate of the Interstate Commerce Commission, Exhibits B and C, dated, respectively, June 17, 1925 and June 8, 1926, [fol. 89] are held to be orders within the meaning of the Commerce Court Act of June 18, 1910 (c. 309, 36 Stat. 539) and Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219), and as under those acts the jurisdiction of the District Court is exclusive, the right of the United States to enforce its demand against the petitioner in such manner as it may deem appropriate and as authorized by law is taken away.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Fifth Defense

United States for the Fifth Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. If it be held that the certificate and amended certificate of the Interstate Commerce Commission, Exhibits B and C, dated, respectively, June 17, 1925 and June 8, 1926, constitute orders of the Commission they have only the force and effect of orders for the payment of money and the petitioner has an adequate remedy at law.

Wherefore, defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Sixth Defense

United States for the Sixth Defense to the petition filed herein against it says:

The petition with the exhibits attached thereto and made a part thereof is without equity on its face and does not state any cause of action against the United States.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

[fol. 90] Seventh Defense

United States for the Seventh Defense to the petition filed herein against it says:

Petitioner has not shown an irreparable or other injury which entitles it to the relief prayed or any part of the same.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Eighth Defense

United States for the Eight- Defense to the petition field herein against it says:

I, II, III, IV, V, VI. On information and belief this defendant admits the facts alleged in paragraphs I, II, III, IV, V and VI in manner and form as alleged, with this exception: defendant denies that the petition was brought to enjoin, set aside, annul and suspend two orders of the Commission as alleged in the paragraph introductory to paragraph I.

VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII. Defendant says that the matters and things alleged in paragraphs VII to XVIII, inclusive, are argumentative, vague, indefinite, uncertain and insufficient and defendant denies the same and each and every part of the same in manner and form as alleged, with these exceptions: defendant admits (a) the Commission made and issued the certificate dated March 1, 1921 and, subject to verification, Exhibit A to the petition is a true copy; (b) the Commission made and issued the certificate dated June 17, 1925 and, subject to verification, Exhibit B to the petition is a true copy; (c) the Commission made and issued the amended certificate dated June 8, 1926 and, subject to verification, Exhibit C to the petition is a true copy; (d) the petitioner and the defendant entered into the agreement dated September 20, 1926, and, subject to verification, Exhibit D to the petition is a true copy; (e) the proceeding and order entitled "In the Matter of Settlements with Carriers under the Provisions of Section 209 of the Transportation Act of [fol. 91] 1920" dated October 18, 1920, as alleged in paragraph VIII; (f) the proceeding and order entitled "Finance Docket No. 1606, In the Matter of Final Settlement under Section 209 of the Transportation Act" dated December 15, 1921, as reported in 70 Interstate Commerce Commission Reports, page 711, et seq., as alleged in paragraph X; (g) the proceeding and order entitled "Finance Docket 501, Guaranty Settlement with Great Northern Railway Company and Affiliated Companies," dated June 17, 1925, as reported in 99 Interstate Commerce Commission Reports, page 231, et seq., as alleged in paragraph XI; and the proceeding and order entitled "Finance Docket No. 501, Guaranty Settlement with Great Northern Railway Company and Affiliated Companies," dated June 8, 1926, as reported in 111 Interstate Commerce Commission Reports, page 318, et seq., referred to in paragraph XI.

Specifically this defendant denies the following allegation and each and every part of the same in Paragraph XII: "Petitioner had not on June 17, 1925, nor on June 8, 1926, and has not now in fact been overpaid in any amount whatever under the terms of said Section 209, or otherwise, and the payments heretofore made to it are not in fact in excess of the amounts necessary to discharge the obligations of the United States to petitioner under Section 209, but on the contrary the Commission's certificate of March 1, 1921, as well as its certificates of June 17, 1925, and June 8, 1926, each greatly understated the amounts due to petitioner."

Further answering defendant alleges that in the proceeding styled "Finance Docket No. 501, Guaranty Settlement with Great Northern Railway Company and Affiliated Companies," dated June 8, 1926, and reported in 111 Interstate Commerce Commission Reports, page 318, et seq., the matters and things set forth in the petition and sought to be put in issue before the Court were all before the Commission, were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions of the Interstate Commerce Act. In its report in writing with respect thereto, a copy of which is attached hereto as Exhibit 1 and made a part hereof, made after full hearing and on due notice to all of the parties, which states its conclusion together with its de-[fol. 92] cision or requirement in the premises, the matter and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence.

Defendant alleges that the facts set forth in the foregoing report of the Commission and each and all of the same are true and correct.

Defendant specifically denies—

(a) Any fact or facts alleged in the petition, or any part of the same, which deny, or which seek to deny, any fact or facts found by the Commission.

(b) Any fact or facts alleged in the petition, or any part of the same, which are inconsistent with any fact or facts found by the Commission.

(c) Any and all inferences of fact from any particular fact or facts alleged in the petition, or any part of the same, which seek to deny, or which are inconsistent with any fact or facts found by the Commission.

(d) Any fact or facts alleged in the petition, or any part of the same, which set up, or which seek to set up, matters and things which were not before the Commission.

(e) Any fact or facts alleged in the petition, or any part of the same, which attack or which seek to attack the action of the Commission, and to show facts other than what the Commission has found and declared.

(f) Any allegations in the petition, or any part of the same which allege that facts were found by the Commission in its report which, as shown on the face thereof, were not so found.

(g) Any conclusions of law alleged and insisted upon in the petition, or any part of the same, which are inconsistent with any conclusions of law held by the Commission.

(h) Each and every allegation in the petition contained not herein specifically admitted or denied.

Wherefore, having fully answered, defendant prays that the petition be dismissed at the cost of the petitioner and for such other and further order as may be appropriate.

Blackburn Esterline, Assistant to the Solicitor General. La Fayette French, Jr., United States Attorney.

[fol. 93] *Duly sworn to by Blackburn Esterline. Jurat omitted in printing.*

[fol. 94] EXHIBIT 1 TO ANSWER OF UNITED STATES

F-2358

INTERSTATE COMMERCE COMMISSION

Finance Docket, No. 501

Guaranty Settlement with GREAT NORTHERN RAILWAY COMPANY and Affiliated Companies

[fol. 95] Finance Docket, No. 501[1]

Guaranty Settlement with GREAT NORTHERN RAILWAY COMPANY and Affiliated Companies

Submitted January 16, 1926. Decided June 8, 1926

Upon argument and further consideration, amount necessary to make good the guaranty of section 209 of the transportation act, 1920, to the Great Northern Railway Company, the Farmers' Grain & Shipping Company, and the Watertown & Sioux Falls Railway Company, ascertain to be $11,277,331.79. An aggregate amount of $6,500,000 having been certified for payment as advances under subdivision (h), and an amount of $6,000,000 having been certified as a partial payment under subdivision (g) of said section, as amended by section 212, the amount due the United States in final settlement is $1,222,668.21. Certificate issued under date of June 17, 1925, amended. Original report, 99 I. C. C. 231.

M. L. Countryman, Walker D. Hines, and F. G. Dorety for the carriers.

Report of the Commission on Argument and Further Consideration

By the COMMISSION:

In the original report in this proceeding, by division 4, 99 I. C. C. 231, the amount due the carriers under section 209

[1] This report also embraces Finance Docket No. 463, Guaranty Settlement with Farmers' Grain & Shipping Company, and Finance Docket No. 879, Guaranty Settlement with Watertown & Sioux Falls Railway Company.

of the transportation act, 1920, was found to be $11,178,887.31, and the amount overpaid $1,321,112.69. A certificate was issued to that effect. The carriers thereafter filed petition for reopening and argument before the commission. Pursuant to the petition, the proceeding was reopened for argument, which was heard on January 7, 1926. By permission, a memorandum supplemental to the oral argument was also filed and has been considered. The Great Northern Railway Company and its subsidiaries, the Watertown & Sioux Falls Railway Company and the Farmers' Grain & Shipping Company, will be collectively referred to as the carrier.

The carrier's principal contentions concern our action in fixing an amount to be included in operating expenses for maintenance of way and structures and of equipment in the guaranty period. In order to obtain a fair view of the car- [fol. 96] rier's contentions in this regard, in their relation to the administration of the section as a whole, a general statement is necessary.

Subdivision (g) of section 209 made it mandatory upon us "as soon as practicable after the expiration of the guaranty period," to "ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier." It is obvious that the amounts necessary to make good the guaranty to the several carriers could not be determined until after the close of the guaranty period and the closing of the books of accounts of the carriers with respect to the charges attributable to that period, and until we had determined the principles which should govern in final settlement.

Subdivision (h) of section 209 gave us discretion to certify advance payments during the guaranty period or thereafter upon applications filed by the carriers during that period and provided, among other things, for the execution of contracts in which the carriers agreed to refund any sums advanced in excess of the amount finally found due under the guaranty. Immediately after the passage of the act, many of the carriers applied for such advance payments, and they were certified from time to time during the guaranty period to an aggregate amount of about $254,000,000, including $6,500,000 to the Great

Northern Railway Company. These advance payments were based upon sworn statements submitted by the carriers and upon other available data, such as annual and monthly reports on file with us.

The necessities of the carriers continued after the termination of the guaranty period, but the law apparently did not permit payments under subdivision (h) unless applications therefor had been filed during the guaranty period. In the case of some carriers, no such applications had been filed. In many cases in which advances had been made it appeared, from such estimates as were practicable at that time, that the amounts necessary to make good the guaranty would permit of additional payments. In view of the necessities of the carriers and the urgency of their requests for further payments, we recommended to Congress such legislation as would meet the situation, and in response thereto Congress enacted section 212 of the transportation act, 1920, effective February 26, 1921, which provided for partial payments. Under this authority we certified additional payments to numerous carriers, aggregating about $169,000,000 in which is included a certificate for $6,000,000 in favor of the Great Northern Railway Company, issued on March 1, 1921, three days after section 212 became law.

When these certificates for partial payments were issued, there were certain questions with respect to the interpreta- [fol. 97] tion of section 209 which he had not finally determined, nor were the books of accounts of the carriers closed with respect to the charges attributable to the guaranty period. Hence final ascertainments of the amounts due under the guaranty could not be made. While the certificates issued for partial payments were definite in form, they were necessarily based upon the facts as then known. For us to have to declined to issue such certificates until the facts were definitely and finally ascertained would have defeated the purpose of the law. These certificates rested principally upon the sworn responses of the carriers to our order of October 18, 1920, which called for statistical data relating to revenues, operating expenses, ton-miles, car-miles, etc., designed to aid in a comparison between the test-period and guaranty-period operations and costs. The intent in these certificates was to leave an ample margin still due and uncertified to protect the interest of the Gov-

ernment, and in the great majority of cases the margin so left proved sufficient for the purpose. Usually, at this time, the carriers computed the data called for by our order of October 18, 1920, in accordance with a formula prepared by the Association of Railway Executives, which represented the theory of the carriers for making proper allowance in the maintenance accounts for increased prices and for changes in amount and use of property. Thus, substantially under this formula, the carrier, under a return filed February 9, 1921, claimed $18,498,391.67 as the amount necessary to make good its guaranty. We had previously certified to advances aggregating $6,500,000, and on March 1, 1921, certified a partial payment of an additional $6,000,000, a total of $12,500,000, leaving an apparent margin of about $6,500,000. On March 26, 1921, the carrier submitted a revision of its return computed entirely in accordance with the railway executives' formula, showing $18,645,653.32 as the amount necessary to make good its guaranty. Later the carrier filed a return, designated as final, in which it claimed $17,599,756.42 as the amount due. But by brief of July 2, 1925, it stated that $15,705,688 was approximately correct and that the amount found due should be "at least $15,000,000," although it prayed in the same brief that we issue a certificate "declaring that no refund is due from the carrier and that there still remains due to the carrier under the guaranty such additional amounts as the Commission may determine," thus indicating a minimum claim of $12,500,000, the amount already paid, plus as much more as might be considered reasonable and just.

At the time of the certificate of March 1, 1921, our interpretation of the law and the method of procedure under [fol. 98] it were under consideration. Final conclusions were later reached, after long and careful deliberation and with the aid of arguments and conferences in which the carriers had full opportunity to present their views, and were announced in two reports, namely, Maintenance Expenses under Section 209, issued July 12, 1921, 70 I. C. C. 115, and Final Settlement under Section 209, issued December 15, 1921, 70 I. C. C. 711.

Ascertainments under the principles announced in these reports resulted in materially smaller allowances for maintenance in the guaranty period than had been claimed by the

carriers under the formula of the railway executives. Our conclusions differed from that formula chiefly in the use of a general equation factor instead of separate factors for each group of maintenance expenditures, in the disallowance of claims based on so-called inefficiency of labor, the use of purchase instead of charge-out prices, the use of separate factors for new and scrap materials, and in the treatment of adjustments for differences in amount and use of property. From time of announcement, our treatment of differences in amount and use of property has been very generally accepted by the carriers, but the largest claims of this carrier arise out of another method by which it would have us compute these adjustments. Protests against our treatment of labor, prices, and scrap, which, if conceded, would have precluded the use of a general equation factor, after hearing and argument were found in Treatment of Salvage, Piecework, and Prices, 82 I. C. C. 678, to have insufficient merit to warrant any change in our adopted procedure. The recognition of other claims of the carrier would require us to reverse our finding in the last-cited report, and, in consequence, to reverse our findings in 70 I. C. C. 711, and 70 I. C. C. 115.

The making of the certifications for partial payments before field check could be made of the sworn data submitted by the carriers, and prior to the final determination of the principles governing the guaranty payments, led to overpayments to 35 carriers. Of these, 28 have reached final settlement, 22 have refunded the overpayment or promised to do so, and 6, including the carrier, have neither repaid nor promised to repay.

The carrier alleges various errors of fact and of law, which may be stated in substance as follows:

I. It is alleged that, in arriving at the equation factor representing the increase in prices of labor and materials in the guaranty period as compared with the test period, we failed to give sufficient consideration to the particular circumstances surrounding the carrier's operations.

[fol. 99] Among the special circumstances alleged to support a greater factor than determined by us are—

(a) Geographical location and consequent effect of climatic conditions.

(b) Exceptional condition in regard to the portion of the maintenance work done in the six months of the guaranty period as compared with the remaining part of the year.

(c) Exceptional distribution between maintenance of way and structures and maintenance of equipment charges.

(d) Exceptional distribution between, and in, the several groups of materials as such and labor as such.

(e) Exceptional prices paid for materials and labor, differing from those paid by other carriers.

(f) Exceptional condition in regard to brass as affecting the factor.

In urging these exceptional conditions the carrier insists that its own operations and prices must be controlling, and under a rigid rule or formula endeavors to support a factor of 2.57 to replace our factor of 2.45. In this connection it lays stress upon comparisons it has made between its claimed factor and the factors used by us in settlement with other carriers in its territory.

II. The carrier alleges that we failed to give proper consideration to the increase in amount of property used by it in transportation service in the guaranty period as compared with the test period, particularly in the increase in joint-facility property, and in this connection urges that for additions and betterments the prices used should be as of the dates of the contracts instead of the dates the expenditures were audited.

III. The carrier alleges that we failed to make sufficient allowance for increase in amount and use of equipment and motive power in the guaranty period as compared with the test period. In this connection it claims that we failed to base the allowance upon the actual conditions existing on its lines, particularly as to the use of owned cars and foreign cars, and that in considering the use of owned cars on other lines we used the average car mileage of the country at large instead of the average car mileage in the territory of the carrier and its immediate connections.

In general, the carrier insists that the amount to be included for maintenance must be determined by its own performance, including its own prices, in the test and guaranty

periods, by its own distribution of charges as between materials as such and labor as such, and by its own allocation of these charges to the various accounts; that in computing the effect of the changed condition, separate factors must be determined for each individual item and account, with specific allowances for crossties, rails, freight-car materials, locomotive materials, section labor, bridge labor, labor of mechanics, etc., and that the result so obtained must be combined into an equation factor under a rigid rule or [fol. 100] formula of its own selection. We said in Maintenance Expenses under Section 209, supra, at page 122:

It appears that after setting forth in general terms the obligation of the director general with regard to upkeep, it became necessary to fix some practicable method by which his compliance with this covenant might be measured. The proviso [paragraph (a) of section 5 of the "standard contract"] was the method definitely agreed upon by the parties. In essence it provides that the annual expenditure, or payment into funds, of sums for maintenance during Federal control equal in the aggregate, after equation in accordance with paragraph (c), to the corresponding sums spent or reserved during the test period "shall be taken as a full compliance with the foregoing covenant."

We went on to say:

We are clear that it was the purpose of this proviso to provide a simple and easily applied test which would make it possible to measure compliance with the covenant by resort to the accounts of the carriers and without the prolonged controversy which would follow any method involving physical inspection or opinion evidence. In other words it was the purpose to employ what has been called an "accounting" test rather than an "engineering inspection" test.

What we have done is to determine from all the evidence before us an equation factor, in accordance with the provisions of paragraph (c) of section 5 of the "standard contract," which, when applied to the amount spent for maintenance proper during the test period, would produce during the guaranty period, under honest, economical, and efficient management, the equivalent of that test-period expenditure. We have not determined a specific allowance

for crossties, rails, section labor, etc., and the result obtained by multiplying the test-period charges in any specific account by our general equation factor has no significance. That factor is a composite factor applicable only to the maintenance expenditures proper of the test period in their entirety.

We further said in the same report as follows:

For the most part these claims [of the carriers] have been based on a formula devised by a committee of accounting officers and engineers representing the Association of Railway Executives. More recently another formula has been devised after conferences between representatives of the carriers and representatives of our bureau of finance. But both these formulæ are based upon the theory that changes in the ratio of maintenance expenditures for labor and for materials, so far as they are not accounted for by differences in prices and wages, necessarily reflect changes in the quality or effectiveness of labor. This theory presupposes a degree of similarity, in two given periods, between the kind of work and the conditions under which it is performed which no formula can establish and which the very nature of maintenance makes improbable, particularly when the comparison is between an average six months of a three-year period and the six guaranty months of the year 1920. The incongruous results which such a formula will produce may easily be shown.

[fol. 101] After five months of further deliberation, aided by computations under other formulæ, we reached this conclusion, in Final Settlement under Section 209, supra:

We are of the opinion that the allowances for differences that may exist between the cost of labor and material for the test period and for the guaranty period, respectively, can not practicably be made upon the basis of any rigid rule or formula, but these allowances must be fixed by us in the exercise of a reasonable judgment upon consideration of all the relevant facts and circumstances.

We further found, in Final Settlement under Section 209, supra, in reference to the manner of computing the guaranty allowance for maintenance, as follows:

There shall first be deducted from the maintenance expenses of the test period all amounts included therein for (a) depreciation, (b) retirements, and (c) insurance.

The remainder, after being adjusted for differences in amount and use of property maintained, shall be multiplied by a factor representing the increase in the general level of cost of labor and material for the territories in which the lines of railway of the carrier are situated. To the product thus arrived at shall be added back the deductions hereinabove provided for, adjusted for differences in amount and/or use of property maintained. The resulting sum will be the amount to be fixed by us as that which shall not be exceeded in charges to operating expenses for the purposes of the guaranty for the aggregate of maintenance of way and structures and maintenance of equipment. The methods of adjustment for differences in amount and use of property are indicated separately for maintenance of way and structures and for maintenance of equipment in the forms hereto annexed.

In Treatment of Salvage, Piecework, and Prices, supra, this matter was further elucidated, on page 679, as follows:

In the same report [Final Settlement under Section 209, 70 I. C. C. 711, 715] we announced that carriers would be required, in submitting their claims or statements, to report the increase in cost of labor and material for their respective territories, but were informed that the prices actually paid by them might not represent the increase in cost for which the law required "due allowance" to be made. In explaining this qualification we said, "What we construe the proviso to mean and what we find to be practicable in a settlement of these matters contemplate a determination of changes in the general levels of cost of labor and material beyond the carrier's control." In administering this principle, we have given consideration to and have made allowance for special conditions affecting individual carriers which were not applicable to other carriers operating in the same general territory. We further announced our conclusion that such determination could not practicably be made upon the basis of any rigid rule or formula, but that the allowance must be fixed in the exercise of a reasonable judgment upon consideration of all the relevant facts and circumstances.

From our investigation and studies we arrived at the conclusions that while there might be unusual conditions affecting the carriers in a particular region, which conditions were beyond their control, nevertheless the effect of [fol. 102] such conditions, being general, would be reflected in the territorial factor, and at the same time we recognized that conditions affecting an individual carrier in such region might not only be unusual and beyond its control, but might be different from those affecting the carriers generally in that territory and that such conditions should be reflected and given weight in the equation factor used in the settlement with the individual carrier.

I

The line of the Great Northern is the most northerly in the United States. For this reason the carrier claims that it is adversely affected by weather conditions to a much greater extent than any other carrier in its territory. The monthly charts of the United States Weather Bureau for the periods involved show a maximum difference in temperature on the line of the Great Northern as compared with that on the lines of other carriers in its territory of only 5°. The average difference in temperature in all probability did not exceed 2°. We are not persuaded that the geographical location of the carrier caused its maintenance conditions to be materially different from those of the other lines in its territory.

It may be admitted, as the carrier claims, that it expended relatively more for maintenance during the guaranty-period months than during the remainder of the year, but the other carriers in its territory did the same, so that this can not be a condition affecting the carrier and not the other carriers in its territory. The carrier advances this circumstance in connection with its contention for an increased equation factor. Whether the carrier spent more or less for maintenance during the months of the guaranty period than during the remainder of the year would have no effect upon the equation factor representing the general increase in prices of materials and wages of labor. In any event, such a claim could not be considered, because the law definitely fixes as a base the average six months of the three-year test period.

The carrier contends that in determining its maintenance allowance an equation factor should be used that is greater than the average for the territory in which it operates, because of the exceptional distribution of its charges during the test period between maintenance of way and structures and maintenance of equipment, and also because of exceptional distribution between expenditures for labor and expenditures for material. The increase of prices in the guaranty period as compared with the test period was not so great for certain materials as for others, nor was it so great in the case of most prices as in the case of wages, and there were like differences as between the wages of various groups of employees. It therefore follows that different [fol. 103] distributions of the same total expenditure in the test period, as between material and labor and as between various forms of maintenance work, will produce different composite equation factors.

The distribution of the maintenance expenditures of the carrier during the test period has been given consideration and has been one of the circumstances leading us to allow the carrier an equation factor somewhat higher than the general territorial level. But the effect of such distribution can not properly be measured by rigid formula, as proposed by the carrier, for a number of reasons. There is no provision in our accounting rules for an accurate distinction between labor as such and material as such. What may be appear as differences between the proportion of labor and material to the total expenditures as between carriers, may in reality be mere differences in nomenclature, that which is called labor by one carrier being termed material by another. The practices of the carriers in this regard vary. Moreover, the analysis of distribution as between different kinds of maintenance and as between labor and material is so complicated and difficult a task that in practice not all items are analyzed. Certain items of material are selected by the carrier as representative of prices of different classes; from these, ratios of increase or decrease are computed. The remaining similar items, or items considered to be in the same class, are assumed to change in the same proportion. The results of such analysis are only approximate. The distribution also varies from year to year, and any rule which attempted to base

equation factors on the exact distribution during the test period would lead to uneven and unjust results for the guaranty period.

It is clear that the entire purpose of the proviso of the standard contract was to adjust expenditures in the aggregate. The plain terms of the proviso so stated. The determinations of increase in general levels of cost must be determinations in the aggregate. The method of this determination was given thorough consideration in the cases which have been cited. The principles there enunciated have been followed in the many settlements with carriers which have since been effected, and the same principles are being followed here. No good reason has been advanced for the adoption at this late date of different principles.

In regard to the contention of the carrier that it paid exceptional prices for materials and for labor differing from the prices paid by other carriers in its territory, it appears that the carrier's test period prices and rates of pay were in some instances lower than those of other carriers. However, a lower test-period price reported by one carrier than [fol. 104] by others for apparently the same article may be due in whole or in part to differences in quality or grade. Moreover, although, as stated, some of the carrier's test-period prices for materials and wages of labor were lower than the average in its territory, others were higher, the same being true of the guaranty period. In the aggregate, the change in the general level differed only slightly from the average of the territory as a whole. It is also evident that in some instances the high guaranty-period rates claimed by the carrier for labor were produced, among other things, by the inclusion of large amounts of overtime pay at penalty rates.

In regard to the carrier's claim, based on a special analysis of brass and journal bearings, for an increase in the equation factor for equipment material, this claim could not be given consideration without abandoning the use of a general equation factor and adopting the impracticable principle of separate equation factors for each item and group of accounts. In view of our former holding in Maintenance Expenses under Section 209, Final Settlement under Section 209, and Treatment of Salvage, Piecework, and Prices, supra, it would seem unnecessary to discuss this

contention. However, if we could accept the principle of separate equation factors and if it were practicable to develop such factors, we could not accept the results here claimed by the carrier for the reason that for the test period the carrier has used assumed prices for new and for scrap brass which were materially below the market price, while for the guaranty period it has used the market price of this brass thus producing a disproportionate increase which in no way indicates the change in the general level of prices but rather gives the relation between a low test-period price arbitrarily fixed by the carrier, without regard to prevailing prices, and the normal guaranty-period price. Incidentally, in pricing rail the carrier reversed the above process, in that it used an arbitrary price for used rail, unsupported by prevailing prices, in the guaranty period.

The carrier argues the injustice of the use of a territorial factor and insists that it has been denied an opportunity to see the anlysis of the facts upon which our factor is based. Our territorial or regional factor represents our judgment of the composite increase in the general level of the prices of materials and wages of labor in the carrier's territory. It has not been and can not be divided into separate factors for each of the items which go to make up the aggregate expenditures, but rests upon all of our studies in connection with this subject, after review of data from various carriers and all other sources, and after consideration of all other relevant facts and circumstances ascertainable. The burden is upon the carrier to show that there existed on its [fol. 105] lines unusual conditions beyond its control and differing from those on the lines of other carriers in its territory, in order that it may be taken out of the general class and assigned a higher or a lower factor. After giving weight to the special conditions on the line of the carrier for which due allowance should be made, we have used in our final ascertainment a factor five points higher than the territorial factor.

As stated above, the carrier has endeavored to support its claim for a higher factor than that used by us by a comparison of its performance with that of the Chicago, Milwaukee & St. Paul, the Northern Pacific, the Chicago, Burlington & Quincy, the Chicago & North Western, and the Minneapolis, St. Paul & Sault Ste. Marie. The comparisons presented lack force for the following reasons:

(a) Each of these comparisons is based on the so-called director general's or Laspeyres' formula, which we ruled against in Maintenance Expenses under Section 209, and again in Final Settlement under Section 209, supra.

(b) The factors the carrier uses for other carriers in its comparisons are not shown to be the result of applying this same formula. As a matter of fact, the factors used are those applied by us in final settlement with these other carriers, and as they are judgment factors, arrived at independently of any rule or formula, they can not be broken down into integral parts for substitution in the formula noted in (a) above, as the carrier has done. The result of such a comparison is untrustworthy.

(c) The effect of the carrier's actual distribution of quantities is not necessarily shown by substituting its quantities in another carrier's factor development, even under a fixed rule, because neither carrier may have selected the same nor a representative set of quantities of materials and of labor in its individual computation of group factors. To illustrate this, there is shown below a comparison between this carrier's analysis and that of the Northern Pacific relative to gross material analyzed in certain groups.

Group	Great Northern	Northern Pacific
	Per cent	Per cent
Rail	76	100
Ballast	73	101
Track material	54	80
Locomotive material (approximate)	30	40
Freight-car material	66	77

It is evident from the above that although the prices are the same, the group factors would be different simply because of the difference in selection of materials.

II

[fol. 106] Before the adoption of our present method for determining the adjustment for differences in amount and use of way and structures property between the test and the guaranty periods, respectively, we found it impracticable

to compare miles of track with miles of track, station buildings with station buildings, steel bridges with steel bridges, wooden trestles with wooden trestles, roadway buildings with roadway buildings, etc., because each item and subdivision would require a different unit of measure and because the accounts of the carriers, under our rules, were not kept in a manner which made it possible to segregate maintenance charges to each of these very numerous and varied items. The only theory which seemed to afford a practicable working basis we found to be that a dollar of equal purchasing power would purchase the same amount of like facilities in the test and in the guaranty period, and that this would require an equal expenditure of such dollars for maintenance. Our adjustment for amount of way and structures property is based upon this broad assumption, with knowledge that the result may not be absolute, but with the assurance that the carrier is given the benefit of all the doubts, it being a generally accepted fact that the vast majority of additions and betterments to way and structures are undertaken because they will reduce operating costs and are justified in many instances by decreased maintenance expenses. Thus, our settlement includes an increased allowance for maintenance directly proportionate to any increase in investment, stated in dollars equated to the test period, although many of the investments are made to bring about a decrease in maintenance expense. Attempted refinements by segregation and separation of small classes of the innumerable items involved have only the appearance of greater accuracy. Unless all items could be so segregated and separated, and the effect of changes in each computed independently, the result would no more nearly approach the truth than does the broad general principle under which we work.

The carrier proposes to compute the equation factor used in reducing the investment added after the test period to a basis comparable with the investment of that period by reckoning from the time of signing the contract for the work, or the time when the work was performed, if done on a cost-plus basis, rather than from the date of audit when the investment was entered in the account. What is said above is a sufficient answer to this refinement. The carrier further proposes to state its investment in road by

adding to the recorded amount the value which it claims for that part of the facilities of other carriers used by it under joint-facility agreements, and by deducting the value which [fol. 107] it assigns to that part of its own property which is used by other carriers under similar agreements. The joint-facility rentals paid by the carrier, whether covered by a lump-sum contract or by a contract based on relative use, are divisible as between maintenance and other charges, and the maintenance portions are included in its test-period expenditures for maintenance, which are equated and of which the carrier has the benefit. To attempt an allowance for net charges in the amount of joint-facility property is an unwarranted refinement, for the reasons above stated.

In the maintenance adjustments claimed by the carrier for use of way and structures property, it would have us make separations between the effect of line-haul and yard switching. While this carrier represents that it has made a separation between its line-maintenance charges and its yard-maintenance charges, our classification of operating expenses, prior to January 1, 1920, did not require such a separation of charges, but merely made such separation permissive. An insignificant number of carriers, if any at all, attempted it. Effective January 1, 1920, such a separation was required in an endeavor to determine the separate costs of freight and passenger service. This, however, could not generally be used in the guaranty-period ascertainments because there was no such separation in the test period with which to make comparison. However, if we grant that the carrier has made a separation of such charges in the test as well as in the guaranty period, we are of the opinion that no advantage of nearer approach to accuracy is to be had by attempting separate adjustments than by the method we follow, for the reason that according to our investigation the relation between line-haul and yard switching is approximately constant. This being true, having determined the relative difference in either as between the two periods, the difference in each is ascertained. We have adopted the line haul as our measure, for the reason that the data for line haul, while not exact, permit a more definite and reliable ascertainment than the data for yard switching.

Nor are the arguments advanced by the carrier in regard to the effect of its ore traffic on the amount which should be included in this switching adjustment convincing. It may be true that the increase in ore business in the guaranty period over the test period was material, yet there is no reason why this increase should have disturbed the relation between line-haul and yard switching. No apparent difference in the length or character of line haul has been shown, and no apparent difference has been shown in the manner of handling cars in the yards in the two periods. In the formulæ adopted by the adjustment committee of the Association of Railway Executives, which the carrier has sometimes followed, attempt was made at many arbitrary [fol. 108] separations and refinements, such as the carrier now advocates, under the theory that such separations and refinements tended to greater accuracy of results. In our analysis of these formulæ it was definitely shown that such was not the case, and it was and is our opinion that, because of the arbitrary separations which had to be made in the book charges, which were not required and were not kept under our accounting rules, more inaccuracies were developed than were corrected by such attempted refinements.

III

In its special claims for additional allowances for differences in amount of equipment in the guaranty period as compared with the test period, the carrier wishes us to depart from an aggregate settlement by making separations between its different classes of cars and by applying particular equation factors to these classes. This is opposed to our procedure, and if it were not so, we could not accept the claim of the carrier, for the reason that it has modified its results by eliminating, for the purpose of its computations, locomotives and cars that were stored for short periods of time during slack business conditions, and thereby has not included in its tonnage all of the locomotives and cars that were active.

With particular reference to adjustment for differences in amount of freight-train car property, the carrier has supported its claims, first, by formulæ of its own, then by

formulæ of the adjustment committee of the Association of Railway Executives, and in various other ways. The results of some of these nearly approach its actual expenditures and that is the amount for which it finally asks. We have been unable to find any exceptional conditions on the lines of the carrier beyond its control and different from those existing on the lines of other carriers in its territory for which allowance should be made. The carrier, in its special claims, relies upon a particular and not an aggregate adjustment. It would have us separate its cars into classes and make a particular adjustment for each class based on separate equation factors for each class, to be applied to separate charges allocated to that class. It also asks a separate adjustment for amount of equipment and for its use, which we have found to be impracticable because of the manner in which accounts for freight-train car repairs are kept. Our adjustments are made for amount and use of equipment on the principle which we outlined in Final Settlement under Section 209, supra, which is that, the use remaining constant, the maintenance expenses for amount of property vary directly with and as the amount of property maintained, and that the result thus obtained must be either increased or decreased in accordance with the rela- [fol. 109] tive intensity of use of the property in the two periods. The final result is an aggregate adjustment for amount and use. The carrier, in its proposed adjustment, complies with only the first step of the above procedure, and this alone would preclude the acceptance of its proposal because of its incompleteness. Further, it would be obviously unfair, under the use of a general equation factor for all classes of property, many of which would require particular equation factors less than the general factor, to pick out a few selected classes having high particular equation factors and to adjust these according to such factors and at the same time adjust all other classes by our general equation factor, which has in it the influence of these high equation factors also.

We think it appropriate to mention here, while it has no effect on the factor, that the carrier has advanced the claim of an equity on account of per diem charges being directly credited to railway operating income, and has stated that the Government receives a direct benefit from such account-

ing. This is a confusion of the effect of our accounting rules. It makes no difference whether the per diem is taken directly into the accounts as income or whether it is separated into its various elements and so included in the accounts; under proper accounting, the net railway operating income indicated is the same.

In its claim for adjustment for differences in use of freight-train car property the carrier relies, first, upon the differences in the dispersion of cars in the test and in the guaranty periods, respectively; that is, in the different proportion of owned cars on its own lines and on the lines of other carriers in the two periods. We can not consider such a claim, for the reason that the effect of such interchange of cars is an intercarrier matter, the adjustment of which is provided for and effected through the application of the per diem and m. c. b. charges promulgated and adopted by the carriers themselves to provide for the very situation which gives rise to the claim. It is within the carriers' control and has no place in the guaranty settlement. Second, the carrier relies upon what it asserts to be the mileage of its own cars on its own lines, which differs from the mileage of foreign cars on its own lines, and upon what it alleges to be the actual mileage of its own cars on foreign lines. It may be possible that the carrier is able to determine the mileage of owned and foreign cars on its own line. We have been unable to find any method by which, or statistics from which, the alleged separate mileage for owned cars on foreign lines may be obtained. We have adopted and follow in our settlements the principle that the difference in use of freight-train cars is represented by the differences in car-miles per car in the periods under comparison. As the matter of car-miles is impossible of exact determination, we have assumed that [fol. 110] the average aggregate miles per car of all cars on the carriers' lines would represent the car-miles per car of owned cars at home, and that the average aggregate car-miles per car of the country at large would represent the car-miles made by owned cars on foreign lines. The theory of the carrier would substitute its assumption for the one which we have made and which has been generally accepted and has been used in all of our settlements. Here, again, the carrier does not follow its assumption to its logical conclusion. The result is dependent, not only upon the variable of

car-miles per car, but on the number of cars, upon the proportion of cars on and off line in each period, and upon the mileage at home and abroad in each period. Taking all these things into account as far as possible, and following the assumption of the carrier through to its conclusion, the result under this assumption will differ from the result which we have obtained and the adjustment which we have proposed by a negligible amount.

The carrier has, from time to time, made claim for special adjustment on account of the maintenance of newly constructed lines put into service immediately prior to or during the test period. We have denied similar claims in the case of a number of other carriers with which final settlement has been made. If we should disregard our previous decisions, we should still be forced to deny the claim of the carrier. Its claim approximates its purported actual expenditures for maintenance of way and structures for these lines. However, its claim rests on the performance of only slightly more than one-half of its newly constructed lines. It is not known what would have been the effect if all of its newly constructed lines had been included in its computation. Further, in order to accomplish the result desired by the carrier, it would be necessary to restate the test-period expenditures for maintenance for these lines, which, as we have before stated, we cannot do under the provisions of the law. If, as the carrier claims, its charges for this maintenance during the test period were below normal, it follows that its income was proportionately larger than it would have been had the normal maintenance been applied. As an equity in the case, although we consider the settlements with the director general and under section 209 as separate and distinct transactions, the carrier has received the benefit of a larger income on account of these new lines, not only during the guaranty period but also during the entire period of Federal control. In support of its claim in this regard, it is stated that it was in an unusual situation, having the greatest amount of newly constructed lines of any carrier in its territory. We find, however, from statements furnished by the carrier, that for the period 1909 to 1916, both years inclusive, the carrier had an increase of new lines amounting to 19.7 per cent of its [fol. 111] mileage, the Chicago, Milwaukee & St. Paul 35.7

per cent, the Northern Pacific 5.4 per cent, and the Minneapolis, St. Paul & Sault Ste. Marie 26.9 per cent, representing an average for the last three lines of 22.8 per cent, from which it does not appear that the carrier had an unusual increase in mileage in the years immediately preceding the middle of the test period as compared with other lines in its territory.

We have had the general and special claims of the carrier before us for a long time and have considered and given such weight as in our judgment seemed proper to each of the claims made by it. In consequence, in our final ascertainment we have used a factor of 2.45, five points above the territorial factor. In discussing somewhat similar contentions in Treatment of Salvage, Piecework, and Prices, supra, we said:

What we construed the law to require, and what we did, was to adopt such a general plan of procedure as in our opinion would secure the greatest measure of justice to the carriers, individually and collectively, and protection to the Government as could be secured with the force and means at our disposal.

In urging claims based upon special circumstances, it is reasonable to assume that the carriers have selected such as appear to favor them rather than those which, if specially treated, might favor the Government. One important circumstance of the latter class may be mentioned. By this contract with the railway companies, the director general was bound to return to them at the end of Federal control material and supplies similar in amount and kind to those taken over at the beginning of Federal control, or to make good to the carriers by payments of cash at prices current on March 1, 1920. The actual cost of material and supplies delivered to the carriers at the end of Federal control was, therefore, the price of the material and supplies as of December 31, 1917, or earlier. Nevertheless, the carriers, following their usual practice, charged into their expense accounts such material and supplies as were used by them at prices current in the guaranty period, thus overstating their actual operating expenses and increasing thereby the deficits to be made up under the guaranty of section 209, and also thereby increasing the apparent change in cost to them between the prices of the test period and those of the

guaranty period, respectively. This condition was referred to in our report in Treatment of Salvage, Piecework, and Prices, supra, where we stated that it was not deemed practicable to allocate the material in question and to apply cost prices thereto, although it might be assumed that the carriers had substantially profited by the omission. It is admitted by this carrier in its final brief that the charge in [fol. 112] its guaranty-period expense accounts due to this cause was about $900,000.

We find nothing in the circumstances of this carrier to justify a greater allowance based upon the contentions stated under I, II, and III. There are, however, other contentions of different nature.

IV

It is alleged that our allowance under subdivision (c), paragraph (1), of section 209, based upon increase in compensation by the director general, provided for in section 4 of the Federal control act, was insufficient, in that we included only that part of the cost of additions and betterments expended during the Federal control period and excluded expenditures incurred prior to the Federal control period for improvements which were completed and put in operation during Federal control.

Section 4 of the Federal control act provides, in substance, that the compensation of carriers under Federal control, which was measured normally by the average railway operating income during the test period, should be increased by an amount reckoned at a reasonable rate per cent, to be fixed by the President, upon the cost of additions and betterments made by the carrier with the approval of or by order of the President while the property was under Federal control. Section 209 of the transportation act refers to this provision in subdivision (c), paragraph (1), as follows:

> The United States hereby guarantees—
>
> With respect to any carrier with which a contract (exclusive of the so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half

the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increase in such compensation provided for in section 4 of the Federal Control Act.

Further reference to section 4 of the Federal control act is found in subdivision (c), paragraph (3), and subdivision (d) of section 209, from which it clearly appears that the amount to be allowed by us under section 209 in recognition of said section 4 is one-half the annual sum fixed by the President under that section. This construction we adopted in Final Settlement under Section 209, supra. The rule has been followed in this case. Under the contract between the carrier and the director general, the carrier waived interest [fol. 113] on cost of additions and betterments made by the corporation and uncompleted December 31, 1917.

V

Our report of June 17, 1925, shows an amount of $31,418.88 due the Farmers' Grain & Shipping Company and an amount of $75,698.89 due the Watertown & Sioux Falls Railway Company. These amounts were applied as offsets to the amount due from the Great Northern Railway Company, the certificates showing only the difference due from the latter company. It is claimed by the carrier that separate certificates and settlements should be made.

The report issued under date of June 17, 1925, shows clearly the finding as to the amount due to or from each of the carriers involved. These findings were combined in one certificate in conformity with the practice in dealing with groups of carriers constituting systems. The certificate recited that the two companies had individually filed with us resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under section 209, and to receive payment of any sum or sums due them thereunder,

said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

In order that our certificate may convey to the Secretary of the Treasury all of the information needed for his guidance in concluding settlements with the carriers, it will be amended to show the amount necessary to make good the guaranty to each of the carriers involved, as well as the payments certified. Whether or not the Secretary of the Treasury should, in the light of the facts, treat the carriers individually and without reference to their common control and operation is a question for his determination.

VI

It is alleged that there were included in the railway operating income accounts of the Great Northern Railway Company for the guaranty period, as credits, items amounting to $121,932.80 which should have been credited in the accounts of the director general, and that the allowance by the carrier of this amount in its settlement with the director general would necessarily reduce the net railway operating income for the guaranty period to the same extent, thereby increasing the amount due the carrier under section 209. It is alleged that these items were erroneously charged against the carrier in our ascertainment and certificate of June 17, 1925.

The protection of the Government, as well as the necessity of avoiding discrimination in the treatment of carriers, [fol. 114] required that the determination of railway operating income be governed by the uniform accounting rules prescribed by us. Therefore, as soon as practicable after the passage of the transportation act, field examinations were undertaken to test and to correct the accounting of each carrier subject to the section, and these examinations have proceeded as rapidly as possible with the force at our disposal. Similar examinations were undertaken by the Director General of Railroads in connection with his settlement with the carriers for the period of Federal control. The items above referred to were reported as a result of the director general's examination. Our own review of the accounts, however, has shown that the amount due the Great

Northern Railway Company under section 209 in respect of such items should be increased by $98,444.48, and the certificate of June 17, 1925, will be amended accordingly. It is understood that this correction is satisfactory to the carrier.

VII

The carrier denies the authority of the commission to question the correctness of its certificate of March 1, 1921, in the amount of $6,000,000 issued under section 212 of the transportation act, which authorizes the certification of only such amounts as are definitely ascertained to be due. This contention of the carrier, in our opinion, is based upon a misconception of the purpose of the certificates provided for by sections 209 and 212. The pertinent portion of section 209 reads as follows:

The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty.

Section 212 contains the following provision:

In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate * * *

It is noted that the certificates thus provided for are issued to the Secretary of the Treasury and not to the carrier to be benefited. It seems clear that their purpose is to protect the Treasury Department in its disbursement of funds of the Government and there is no indication of any intent on the part of Congress to vest the carriers with any

[fol. 115] rights under the certificates distinct from their rights under the sections as a whole. The circumstances under which the certificates covering partial payments under section 212 were issued have been described. Notwithstanding the fact that section 212 contemplated a definite ascertainment of amounts due, the statute must be read in the light of the circumstances surrounding its administration. Insistence upon absolute insurance against overpayment would have defeated the purpose of the law. If we have construed the statute too liberally, the carriers have received the benefit.

With the exception indicated, the findings of the report of June 17, 1925, are affirmed.

Amended Certificate No. A-1041 under Section 209 (g) of the Transportation Act, 1920 (Cancels Certificate No. A-1041 Dated June 17, 1925)[1]

To the Secretary of the Treasury of the United States:

1. The Interstate Commerce Commission, hereinafter called the commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, the Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers, are carriers as defined in subdivision (a) of section 209 of the transportation act, 1920, and that the carriers filed with the commission on or before March 15, 1920, written statements that they accepted all of the provisions of said section 209 and that the two companies last mentioned individually filed with the commission resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under said section 209 and to receive payment of any sum or sums due them thereunder, said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The commission has ascertained, and hereby certifies to the Secretary of the Treasury, that the amount necessary

[1] This certificate also embraces Finance Dockets Nos. 463 and 879.

to make good to said Great Northern Railway Company the guaranty provided by section 209 of the transportation act, 1920, is $11,170,214.02; that the amount necessary to make good said guaranty to said Farmers' Grain & Shipping Company is $31,418.88; and that the amount necessary to make good said guaranty to the said Watertown & Sioux Falls Railway Company is $75,698.89.

[fol. 116] 3. The commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) to said Great Northern Railway Company an aggregate amount of $6,500,000, as follows:

Certificate No. 65, June 25, 1920	$3,000,000
Certificate No. 225, August 31, 1920	2,000,000
Certificate No. 276, November 4, 1920	1,500,000

and as partial payment to said Great Northern Railway Company under section 209 (g), as amended by section 212, an amount of $6,000,000 on March 1, 1921, under certificate No. A-329.

4. The commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the transportation act, 1920.

Dated this 8th day of June, 1926.

By the commission.

George B. McGinty, Secretary.

[fol. 117] [File endorsement omitted.]

[fol. 118] In United States District Court

In Equity. No. 864

Great Northern Railway Company, a Corporation, Petitioner,

vs.

United States of America, Defendant, and Interstate Commerce Commission, Intervener

Order Dismissing Petition—Filed October 1, 1927

This cause came on to me heard before Honorable William S. Kenyon, United States Circuit Judge, Honorable

Joseph W. Molyneaux and Honorable John B. Sanborn, United States District Judges, sitting pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219), on the 13th day of June, 1927, at St. Paul, Minnesota.

Mr. F. G. Dorety, Mr. Thomas Balmer, and Mr. Fletcher Rockwood appeared for the petitioner, and Mr. Blackburn Esterline, Assistant to the Solicitor General, and Mr. Lafayette French, Jr., United States Attorney, for the defendant, and Mr. D. W. Knowlton for the Interstate Commerce Commission, intervener.

The defendant and intervener moved to dismiss the petition on the ground that the court had no jurisdiction. The court ordered that the question of jurisdiction be first argued and determined, and, after oral argument, fixed the [fol. 119] time within which briefs should be filed on that question. Briefs have been filed by the petitioner, by the defendant, by the intervener, and by C. C. Hine, General Solicitor, Chicago, Indianapolis and Louisville Railway Company, as amicus curiæ.

The petitioner, a common carrier, brings this action against the United States of America to enjoin, set aside, annul and suspend two certificates of the Interstate Commerce Commission of the United States, dated June 17, 1925 and June 8, 1926, respectively, which purport to fix the compensation due to the petitioner under the guaranty of its earnings for the period from March 1, 1920, to September 1, 1920, under the terms of Section 209 (41 Stat. 464) and Section 212 (41 Stat. 1145) of the Transportation Act of 1920; and to restrain the defendant from acting thereunder.

The certificate of June 17, 1925, issued under Section 209 (g) of the Transportation Act, certifies to the Secretary of the Treasury that the amount of $11,178,887.31 is the amount necessary to make good to the petitioner the guaranty provided by said Section 209; that the Commission had theretofore certified to the Secretary of the Treasury, as advances under Section 209 (h), an aggregate amount of $6,500,000, and, as a partial payment under Section 209 (g) as amended by Section 212, an amount of $6,000,000, making a total of $12,500,000; that the amount due the United States on account of the overpayment to the petitioner under Section 209 (h) is $1,321,112.69.

The certificate of June 8, 1926, entitled "amended certificate" certifies that $11,170,214.02 is the amount necessary to make good to the petitioner the guaranty under Section 209; that the amount already paid to the petitioner under Section 209, and Section 209 as amended by Section 212, is $12,500,000.

The petition alleges that these certificates of the Interstate Commerce Commission are erroneous and do not fix the amount to which the petitioner is entitled under the sections of the Transportation Act referred to, and are therefore unlawful and void.

[fol. 120] The petition shows that the United States has asserted a claim against the petitioner in the amount of $1,329,785.98, with interest at 6 per cent per annum from July 8, 1926, because of the alleged overpayment. In order to avoid the offsetting of the claim of the United States against amounts due the petitioner from the government for transportation services, the petitioner, on September 20, 1926, deposited government securities pending the determination of this controversy, upon the understanding that, if it should be determined that the claim of the government is a valid claim, it might be offset against the securities so deposited, and if it should be determined to be an invalid claim, the securities should be returned.

The claim of the petitioner is, in effect, that the Interstate Commerce Commission failed to comply with the law in determining the amount due the petitioner under the Transportation Act; that the certificates constitute orders of the Commission, which may be enjoined or annulled by this court, acting under the provisions of the Urgent Deficiencies Act.

After considering the arguments and briefs of counsel, we have reached the conclusion that this court has no jurisdiction to grant the relief prayed for by the petitioner, on the grounds: (1) that the certificates are not orders which can be enjoined or annulled under the provisions of the acts giving this court jurisdiction to review orders of the Interstate Commerce Commission; (2) that Congress has not consented that the United States be sued in this court in this proceeding; (3) that in this proceeding the certificates of the Interstate Commerce Commission must be taken as final and conclusive.

It is ordered that the petition be dismissed.
Dated this 30th day of September, 1927.

Wm. S. Kenyon, United States Circuit Judge. Joseph W. Molyneaux, United States District Judge. John B. Sanborn, United States District Judge.

[File endorsement omitted.]

[fol. 121] In United States District Court

[Title omitted]

Order Dismissing Petition (Amended)—Filed October 20, 1927

This cause came on to be heard before Honorable William S. Kenyon, United States Circuit Judge, Honorable Joseph W. Molyneaux, and Honorable John B. Sanborn, United States District Judges, sitting pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219), on the 13th day of June, 1927, at St. Paul, Minnesota.

Mr. F. G. Dorety, Mr. Thomas Balmer, and Mr. Fletcher Rockwood appeared for the petitioner, and Mr. Blackburn Esterline, Assistant to the Solicitor General, and Mr. Lafayette French, Jr., United States Attorney, for the defendant, and Mr. D. W. Knowlton for the Interstate Commerce Commission, intervener.

The defendant and intervener moved to dismiss the petition on the ground that the court had no jurisdiction. The court ordered that the question of jurisdiction be first argued and determined, and, after oral argument, fixed the time within which briefs should be filed on that question. Briefs have been filed by the petitioner, by the defendant, by the intervener and by C. C. Hine, General Solicitor Chicago, Indianapolis and Louisville Railway Company, as amicus curiæ.

[fol. 122] The petitioner, a common carrier, brings this action against the United States of America to enjoin, set aside, annul and suspend two certificates of the Interstate Commerce Commission of the United States, dated June 17,

1925, and June 8, 1926, respectively, which purport to fix the compensation due to the petitioner under the guaranty of its earnings for the period from March 1, 1920, to September 1, 1920, under the terms of Section 209 (41 Stat. 464) and Section 212 (41 Stat. 1145) of the Transportation Act of 1920; and to restrain the defendant from acting thereunder.

The certificate of June 17, 1925, issued under Section 209(g) of the Transportation Act, certifies to the Secretary of the Treasury that the amount of $11,178,887.31 is the amount necessary to make good to the petitioner the guaranty provided by said Section 209; that the Commission had therefore certified to the Secretary of the Treasury, as advances under Section 209(h), an aggregate amount of $6,500,000, and, as a partial payment under Section 209(g) as amended by Section 212, an amount of $6,000,000, making a total of $12,500,000; that the amount due the United States on account of the overpayment to the petitioner under Section 209(h) is $1,321,112.69.

The certificate of June 8, 1926, entitled "amended certificate," certifies that $11,170,214.02 is the amount necessary to make good to the petitioner the guaranty under Section 209; that the amount already paid to the petitioner under Section 209, and Section 209 as amended by Section 212, is $12,500,000.

The petition alleges that these certificates of the Interstate Commerce Commission are erroneous and do not fix the amount to which the petitioner is entitled under the sections of the Transportation Act referred to, and are therefore unlawful and void.

The petition shows that the United States has asserted a claim against the petitioner in the amount of $1,329,785.98, with interest at 6 per cent per annum from July 8, 1926, because of the alleged overpayment. In order to avoid the off- [fol. 123] setting of the claim of the United States against amounts due the petitioner from the government for transportation services, the petitioner, on September 20, 1926, deposited government securities pending the determination of this controversy, upon the understanding that, if it should be determined that the claim of the government is a valid claim, it might be offset against the securities so deposited,

and if it should be determined to be an invalid claim, the securities should be returned.

The claim of the petitioner is, in effect, that the Interstate Commerce Commission failed to comply with the law in determining the amount due the petitioner under the Transportation Act; that the certificates constitute orders of the Commission, which may be enjoined or annulled by this court, acting under the provisions of the Urgent Deficiencies Act.

After considering the arguments and briefs of counsel, we have reached the conclusion that this court has no jurisdiction to grant the relief prayed for by the petitioner, on the grounds: (1) that the certificates are not orders which can be enjoined or annulled under the provisions of the acts giving this court jurisdiction to review orders of the Interstate Commerce Commission; (2) that Congress has not consented that the United States be sued in this Court in this proceeding.

It is ordered that the petition be dismissed for want of jurisdiction.

Dated this 19 day of October, 1927.

Wm. S. Kenyon, United States Circuit Judge. Joseph W. Molyneaux, United States District Judge. John B. Sanborn, United States District Judge.

[File endorsement omitted.]

[fol. 124] In United States District Court

[Title omitted]

Petition for Appeal and Order Allowing Same—Filed October 21, 1927

To the Honorable Joseph W. Molyneaux, United States District Judge:

The above named petitioner, feeling aggrieved by the order dismissing petition made and entered in the above entitled cause on the 30th day of September, 1927, as amended by the order dismissing petition (amended) made and entered in the above entitled cause on the 19th day of

October, 1297, both of which orders were made by the Honorable William S. Kenyon, United States Circuit Judge, Honorable Joseph W. Molyneaux, and Honorable John B. Sanborn, United States District Judges, sitting pursuant to the Urgent Deficiencies Act of October 22, 1913, (38 Stat. 208, 219) hereby appeals from said orders to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith; and the petitioner prays that its appeal may be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings, and papers upon which said orders were based, duly authenticated, be sent to the Supreme [fol. 125] Court of the United States, sitting at Washington, D. C.

And your petitioner further prays that the proper order relating to the security to be required of them be made.

F. G. Dorety, Thomas Balmer, Fletcher Rockwood,
Solicitors for Petitioner.

The petition is granted and the appeal allowed, upon giving bond conditioned as required by law, in the sum of $1,000.00.

Done in open court this 21 day of October, 1927.

Joseph W. Molyneaux, District Judge.

[File endorsement omitted.]

[fols. 126-128] Bond on appeal for $1,000, approved and filed October 21, 1927, omitted in printing.

[fol. 129] In United States District Court

[Title omitted]

Assignments of Error—Filed October 21, 1927

Now on this 21st day of October, 1927, comes the petitioner, by its solicitors, F. G. Dorety, Thomas Balmer, and Fletcher Rockwood, and says that the order dismissing petition made and entered in the above entitled cause on the 30th day of September, 1927, as amended by the order dis-

missing petition (amended) made and entered in said cause on the 19th day of October, 1927, both of said orders having been made and entered by the Honorable William S. Kenyon, United States Circuit Judge, Honorable Joseph W. Molyneaux, and Honorable John B. Sanborn, United States District Judges, sitting pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219) is erroneous and unjust to said petitioner, for the reasons set forth in the following

Assignment of Errors

I

Said court erred in holding that the two certificates of the Interstate Commerce Commission, dated June 17, 1925, and June 8, 1926, respectively, which purport to fix the compensation due to the petitioner under the guaranty of its earnings for the period from March 1, 1920, to September 1, [fol. 130] 1920, under the terms of Section 209 (41 Stat. 464) and Section 212 (41 Stat. 1145) of the Transportation Act of 1920, are not orders which could be enjoined or annulled under the provisions of the acts giving said court jurisdiction to review orders of the Interstate Commerce Commission.

II

Said court erred in holding that Congress has not consented that the United States be sued in this court in this proceeding.

III

Said court erred in dismissing the petition for want of jurisdiction.

Wherefore the petitioner prays that said order dismissing petition dated September 30, 1927, as amended by said order dismissing petition (amended) dated October 19, 1927, may be reversed.

F. G. Dorety, Thomas Balmer, Fletcher Rockwood,
Solicitors for Petitioner.

Dated October 21, 1927.

[File endorsement omitted.]

[fols. 131 & 132] Citation, in usual form, showing service on Blackburn Esterline et al., filed November 1, 1927, omitted in printing.

[fol. 133] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed November 1, 1927

To the clerk of the above entitled court:

You will please include in the transcript to be transmitted to the Supreme Court of the United States upon the appeal taken by the petitioner in the above entitled cause from the order dismissing petition dated September 30, 1927, as amended by the order dismissing petition (amended) dated October 19, 1927, the following portion of the record:

(1) Petition, including exhibits.
(2) Intervention of Interstate Commerce Commission.
(3) Answer of Interstate Commerce Commission, including Exhibit "A" attached thereto.
(4) Answer of United States to the Petition.
(5) Order dismissing petition dated Sept. 30, 1927.
(6) Order dismissing Petition (Amended) dated October 19, 1927.
[fol. 134] (7) Petition for Appeal and Order allowing same.
(8) Appeal Bond.
(9) Assignment of Errors.
(10) This Præcipe.

Dated at St. Paul, Minnesota, this 21 day of October, 1927.

F. G. Dorety, Thomas Balmer, Fletcher Rockwood,
Solicitors for Petitioner.

Service of the within Præcipe is hereby accepted for the United States of America this 27 day of October, 1927.

Blackburn Esterline, Assistant to the Solicitor General. Lafayette French, Jr., United States Attorney.

Service of the within Præcipe is hereby accepted for the Interstate Commerce Commission this 27 day of October, 1927.

Daniel W. Knowlton, Solicitor for Intervener.

[File endorsement omitted.]

[fol. 135] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 136] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT WILL RELY AND DESIGNATION TO PRINT ENTIRE RECORD—Filed November 23, 1927.

To the Clerk of the above-entitled court and to the appellees above named and their solicitors:

Please take notice that the appellant in the above entitled cause intends to rely in the above entitled court upon the following points:

1. The specially constituted court, consisting of the Honorable William S. Kenyon, United States Circuit Judge, Honorable Joseph W. Molyneaux and Honorable John B. Sanborn, United States District Judges, sitting in the United States District Court, District of Minnesota, Third Division, pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219), erred in holding that the two certificates of the Interstate Commerce Commission, dated June 17, 1925, and June 8, 1926, respectively, which purport to fix the compensation due to the petitioner under the guaranty of its earnings for the period from March 1, [fol. 137] 1920, to September 1, 1920, under the terms of

Section 209 (41 Stat. 464) and Section 212 (41 Stat. 1145) of the Transportation Act of 1920, are not orders which could be enjoined or annulled under the provisions of the acts giving said court jurisdiction to review orders of the Interstate Commerce Commission.

2. Said court erred in holding that Congress has not consented that the United States be sued in said court in this proceeding.

3. Said court erred in dismissing the petition for want of jurisdiction.

Inasmuch as the case was decided by said specially constituted court upon a motion to dismiss the petition for lack of jurisdiction, appellant thinks the entire record is necessary for the consideration of the points on which the appellant intends to rely. The record consists of the following:

(1) Petition, including exhibits.
(2) Intervention of Interstate Commerce Commission.
(3) Answer of Interstate Commerce Commission, including Exhibit "A" attached thereto.
(4) Answer of United States to the Petition.
(5) Order dismissing petition dated Sept. 30, 1927.
(6) Order dismissing petition (amended) dated October 19, 1927.
(7) Petition for Appeal and Order allowing same.
(8) Appeal Bond.
(9) Assignment of Errors.
(10) Præcipe for Appeal Transcript.

Dated at St. Paul, Minnesota, this 14th day of November, 1927.

F. G. Dorety, Thomas Balmer, Fletcher Rockwood, Solicitors for Appellant.

[fols. 138 & 139] Service of the within statement is hereby accepted for the United States of America this 23d day of November, 1927.

Blackburn Esterline, Assistant to the Solicitor General. Lafayette French, Jr., United States Attorney.

Service of the within statement is hereby accepted for the Interstate Commerce Commission this 22d day of November, 1927.

P. J. Farrell, Daniel W. Knowlton, Solicitors for Interstate Commerce Commission.

[fol. 140] [File endorsement omitted.]

Endorsed on cover: File No. 33,064. Minnesota D. C. U. S. Term No. 612. Great Northern Railway Company, appellant, vs. The United States of America and Interstate Commerce Commission. Filed November 11th, 1927. File No. 33,064.

FILED
APR 5 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927.

NO. 612.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Appeal from the District Court of the United States for the District of Minnesota.

BRIEF OF APPELLANT.

F. G. DORETY,
THOMAS BALMER,
FLETCHER ROCKWOOD,
Attorneys for Appellant.

Dated March 30, 1928.

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Supreme Court of the United States

OCTOBER TERM, 1927.

NO. 612.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Appeal from the District Court of the United States for the District of Minnesota.

BRIEF OF APPELLANT.

The opinion of the Court below is reported in 22 Fed. Rep. 2nd, 865.

GROUNDS OF JURISDICTION.

The judgment to be reviewed is an Order Dismissing Petition (Amended), dated October 19, 1927, and filed October 20, 1927 (R. 110 to 112 inclusive).

The petition in the Court below (R. 1-30 inclusive) asks the court to set aside, annul and suspend two certain orders made by the Interstate Commerce Commission dated June 17, 1925, and June 8, 1926, (Exhibits B and C of petition, R. 23 to 26 inclusive), purporting to determine the amount due to the appellant (petitioner below) from the United States under Section 209 of the Transportation Act of 1920 (41 Stat. 464, 1145), guaranteeing to appellant a certain net railway operating income for its operations during the guaranty period of six months immediately following Federal Control. The jurisdiction of the court below was invoked under the provisions of the Commerce Court Act of June 18, 1910 (c. 309, 36 Stat. 539), and the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219-221; U. S. C. 28:41), giving the court jurisdiction to set aside orders of the Interstate Commerce Commission. The order from which this appeal was taken was made by a court specially constituted under the provisions of the statute just cited, consisting of Hon. Wm. S. Kenyon, United States Circuit Judge; Hon. Joseph W. Molyneaux, and Hon. John B. Sanborn, United States District Judges. The respondents (defendants below) moved to dismiss the petition for lack of jurisdiction, upon the grounds, among others, that the order sought to be enjoined was not an order within the meaning of said statutes, but was merely a certificate of fact, and that Congress had not consented that the United States be sued in said court in said proceeding (R. 75-80, inclusive). The lower court held, upon the grounds just mentioned, that it had no jurisdiction and ordered the petition dismissed (R. 111-112).

The jurisdiction of this court is invoked under Section 210 of the Commerce Court Act of June 18, 1910 (36 Stat. 1146), Section 238 of the Judicial Code (U. S. C. 28:345), which provide for direct review by this court of an interlocutory or final judgment or decree of a district court in case an order of the Commission is sought to be enjoined, and upon the Urgent Deficiencies Act of October 22, 1913, (38 Stat. 220, U. S. C. 28:47) which also provides for this direct appeal.

STATEMENT OF THE CASE.

The judgment under review is an order dismissing our petition without any evidence having been taken. The judgment therefore assumes the accuracy of the facts stated in the petition and the facts so stated must be regarded as the facts and all of the facts upon which the decision of this court must be based.

Paragraphs I to VIII inclusive of the petition (R. 2-5) show that on March 1, 1921, in accordance with Section 212 of the Transportation Act (as added by the Act of February 26, 1921, 41 Stat. 1145), the Commission had "definitely ascertained" and certified that petitioner was entitled to a total amount of $12,500,000 as its guaranty under Section 209 of the Transportation Act "in addition to any further sums that might later be determined upon", and that appellant received payment of this entire amount. On June 17, 1925, or more than four years later, the Commission certified that appellant had been entitled to only $11,178,887.31, and that there was due the United States on account of overpayment to appellant a refund in the sum of $1,321,112.69 (Petition Exhibit B, R. 23). On

June 8, 1926, or nearly one year later still, the Commission ascertained that the amount due to appellant had been $11,170,214.02 (Petition Exhibit C, R. 24).

The petition alleges (Paragraph 12, R. 7) and it must therefore be taken as true, that appellant had not in fact been overpaid in any amount whatever, but that, on the contrary, all of the certificates had greatly understated the amounts due to appellant.

The Secretary of the Treasury demanded refund by the appellant of the alleged overpayment certified by the Commission, and the Comptroller General notified appellant that amounts due it for mail, freight and passenger transportation and other earnings would be withheld until the claimed refund should be made (Petition, Paragraph 18, R. 19). The Commission in making its certificates of 1925 and 1926, did not assert, and has not alleged or offered to prove in this action, that its "definite ascertainment" of $12,500,000 in its certificate of March 1, 1921, or that the money paid thereunder, was obtained by fraud or that any mistake of law or fact had been made.

We are attacking the later certificates of 1925 and 1926 upon the grounds:

1. That after having made a final determination of a larger sum and after payment of such sum to appellant, subsequent findings made four or five years later that the payment should have been smaller, and that a refund was due, had not the conclusive and binding effect of a certificate under Section 209 of the Transportation Act, and that the Commission had no jurisdiction to issue its subsequent certificates as such, but that the Government's only remedy would be an action for recovery of money

obtained by fraud, or paid under mistake, and that an order purporting to be a conclusive and binding certificate under Section 209, and on which the Secretary of the Treasury and Comptroller General are attempting to act, should be enjoined as not being within the jurisdiction of the Commission;

2. That even if the Commission still retained jurisdiction to issue a certificate under Section 209 for a smaller amount, and to find that a refund was due, its determination to that effect in this case was made under erroneous interpretations of the statute, and was subject to injunction for errors of law appearing upon the record. The various errors of law which we allege the Commission committed are set forth in Paragraphs XIII to XVII inclusive of the petition (R. 8-19).

The respondents contended below that the statutes conferring jurisdiction upon the district court to set aside orders of the Commission, apply only to orders made under the Interstate Commerce Act, such as rate orders; that the certificates in question are mere certificates of fact, made under another statute, and not "orders"; and that even though erroneous in law and in fact, they are not subject to cancellation by the district court. The lower court took this view and did not consider the alleged errors of law, but held that it had no jurisdiction whatever over the certificates, and could not set them aside, even though they were erroneous in fact and law.

The first question involved here, therefore, is whether the certificates in question are orders or requirements of the Interstate Commerce Commission within the meaning of the statutes giving the district court jurisdiction. If

this question is decided in the affirmative, we assume that this court will still be faced with the question whether errors of law are sufficiently alleged in the petition to warrant the setting aside of the orders. Therefore, while our alleged errors of law were not considered by the court below, we will undertake to explain or discuss them briefly here, after first discussing the preliminary question as to whether the certificates in question are "orders" of the Commission, and whether the district court had jurisdiction to correct any errors either of law or of fact, if they should be found to exist.

Before undertaking an argument of these questions, a somewhat fuller statement regarding the facts and the statutes may be helpful. The effect of Section 209 (c) of the Transportation Act (quoted in the Appendix to this brief), so far as appellant is concerned, was to guarantee to it for the six months following Federal control (the guaranty period) a net railway operating income equal to one-half of the annual compensation which it had received during Federal control. Section 209 (f), (also quoted in the Appendix to this brief), provides that in determining net railway operating income the amount of certain expenses to be charged against gross revenue should be determined by the Commission in a certain prescribed manner. The errors of law which we allege in the later paragraphs of our petition all involve claims that the Commission failed to comply with the requirements of this section in making this determination of our operating expenses.

Section 209 (g) provides that the Commission shall ascertain and certify to the Secretary of the Treasury the amounts necessary to make good the guaranty and that he

should draw warrants therefor. Section 209 (h) provides that upon certificate of the Commission and "during the guaranty period" *advances* might be made from time to time, not in excess of the "estimated amount necessary to make good the guaranty." This section requires the carrier to execute a contract for refund of any excess payments. Under this provision the appellant received advances of $6,500,000.00 during the guaranty period (petition, paragraph V, R. 2) and agreed to refund any excess, securing this agreement by a deposit of Liberty Bonds (petition, paragraph VII, R. 3). It will be noted that the section last quoted permitted *advances* "during the guaranty period" only, and did not permit any advances to be made after the guaranty period but before final determination of the whole amount due.

In this situation Section 212 was added to the Transportation Act on February 26, 1921 (41 Stat. 1145). It will be noted that this was after the guaranty period but before any final settlement with the appellant. This section did not mention "advances" nor provide for any refund of excess payments, but did provide that the Commission "if not at the time able finally to determine the whole amount due * * * may make its certificate for any amount definitely ascertained by it to be due" and provided that the Secretary of the Treasury might draw warrants upon such certificates. In accordance with this provision the Commission issued its certificate of March 1, 1921, (petition, Exhibit A, R. 22) ascertaining and certifying "that the amount of six million dollars ($6,000,000.00) in addition to any other sum or sums heretofore certified in favor of the carrier under Section 209 of the Transportation Act, 1920, is necessary to make

good to said carrier the guaranty provided by said section." The Commission further certified "that such amount of six million dollars ($6,000,000.00) cannot be reduced by further accounting or otherwise, and there may be, upon further investigation, additional amounts found due to said Great Northern Railway Company * * *". In accordance with this certificate the Secretary of the Treasury paid to appellant the further sum of six million dollars ($6,000,000.00), making twelve million five hundred thousand dollars ($12,500,000.00) in all (petition, paragraph VIII, R. 5). This paragraph of the petition also shows that the latter certificate was made in a pending proceeding before it in which appellant had claimed a very much larger amount.

More than four years later, that is on June 17, 1925, the Commission made the first of its orders which are under attack here, showing that the total amount to which appellant had been entitled was only $11,178,887.31, and that a refund was due from appellant to the United States of $1,321,112.69 (petition, Exhibit B, R. 23). Almost a year later still, that is on June 8, 1926, the Commission made the last of its orders under attack here, finding that the total due appellant had been $11,170,214.02 (petition, Exhibit C, R. 24).

Following each of the latter two orders the Secretary of the Treasury demanded payment of the refund by appellant; and following the latter order the Comptroller General notified appellant that amounts due to it from the United States for mail, freight and pasesnger transportation would be withheld pending payment of this refund, and thereupon the Comptroller General did in fact withhold such amounts in excess of two million dollars (peti-

tion, paragraph XVIII, R. 19). Thereupon, and solely for the purpose of obtaining said payments, appellant entered into an agreement with the Comptroller General (petition, Exhibit D, R. 26), under which appellant pledged with the Comptroller General bonds in the amount of $1,625,000.00, to secure payment of said refund if it should be found to be due, and the Comptroller General thereupon released the $2,000,000.00 due to appellant as aforesaid for transportation earnings. The said Liberty Bonds were to be held by the United States as security until final determination of the Government's claim for refund, either by decision of a court of last resort having jurisdiction, or by agreement of the parties.

This action is brought in accordance with the said agreement with the Comptroller General, for the purpose of determining the validity of the Government's claim to refund. The petition seeks to enjoin the certificates of the Commission, to enjoin the withholding of the pledged Liberty Bonds and of payments otherwise due to appellant, and the use of the certificates of the Commission for any purpose.

The answer of the United States contains a motion to dismiss on the ground that the District Court was without jurisdiction. The answer further moves for a dismissal of the petition on the grounds: (a) That the petition is without equity on its face and does not state any cause of action against the United States, and, (b) That the appellant has not shown irreparable or other injury which entitled it to the relief prayed for.

The answer of the Commission contains, as a separate defense, allegations which are equivalent to a motion to

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SPECIFICATION OF ASSIGNED ERRORS.

Appellant intends to urge all of the errors set forth in the assignment of errors on page 114 of the record, which are as follows:

I.

Said Court erred in holding that the two certificates of the Interstate Commerce Commission, dated June 17, 1925, and June 8, 1926, respectively, which purport to fix the compensation due to the petitioner under the guaranty of its earnings for the period from March 1, 1920, to September 1, 1920, under the terms of Section 209 (41 Stat. 464) and Section 212 (41 Stat. 1145) of the Transportation Act of 1920, are not orders which could be enjoined or annulled under the provisions of the acts giving said Court jurisdiction to review orders of the Interstate Commerce Commission.

II.

Said Court erred in holding that Congress has not consented that the United States be sued in this Court in this proceeding.

III.

Said Court erred in dismissing the petition for want of jurisdiction.

OUTLINE OF ARGUMENT.

In our main argument we will discuss, first, the jurisdiction of the court to review these certificates in an injunction proceeding and to determine whether or not they are erroneous; and, second, whether the certificates are so far erroneous as to call for injunctive relief. In this preliminary statement we shall give a brief outline of our argument on both of these questions but will reverse the order above stated and outline first our arguments showing why we believe the certificates are erroneous.

Are the certificates in questions erroneous as a matter of Law?

We shall contend that they are erroneous, first, because the Commission had no jurisdiction to make them, and, second, because if it had jurisdiction it failed in exercising it in such a way as to comply with the specifications and requirements of the Statute which defines the items to be computed and the manner of computing them.

In support of our argument that the Commission had no jurisdiction to make its certificates of 1925 and 1926, we shall argue that having made, in 1921, a definite ascertainment that $12,500,000 was due the carrier and that amount having been paid, the Commission could not thereafter set this finding aside and find that the carrier had been entitled to only a little over $11,000,000, and recover refund of this, without proof of fraud or mistake in the original finding. Whether the certificate of 1921 for $12,500,000 be regarded as analagous to the judgment of a court, to a legislative act, to an administrative determination or to an award of arbitrators, it was completed by

the payment of the money which became vested in the carrier, and neither the Commission or any other agency of the government had any jurisdiction years afterwards to reopen the finding and issue a fiat calling for refund of part of the payment, by summary action, and without any claim of either fraud or mistake in the prior finding.

The government seemed to concede that this would be true of a final determination of the entire amount due the carrier, made under Section 209(g), but claimed that a partial determination under Section 212 was similar to a certificate for an advance under Section 209(h) and that, therefore, the preliminary finding was without effect and that the Commission could reduce it by summary action and call for a refund without showing either fraud or mistake in its original finding.

We assert the following grounds for claiming that a certificate of partial payment made under Section 212 is no more subject to reopening by summary action than would be a final certificate under Section 209(g).

(1) The wording of Section 212(a) clearly indicates that a finding made thereunder is pro tanto a definite and final ascertainment.

(2) It provides for payment of the money without agreement or security for refund. Such payment could be enforced by mandamus.

(3) It is in marked contrast with the wording of Section 209(h) under which "advances" were to be made with provision for refund of over-payment if any.

(4) Section 212(a) is in marked contrast with Section 212(b) which provides that these certificates of partial payment shall be "prima facie but not conclusive evidence of their correctness", *only as to a certain limited class of*

items. This clearly implies that the certificate is conclusive and not merely prima facie as to all other items.

(5) Correspondence before the Congressional Committee which was considering Section 212 prior to its passage shows an understanding that findings made under Section 212 were to be conclusive (see letter from Chairman Clark of the Commission to Chairman Esch of the Congressional Committee which was copied in Appendix B to this brief).

It follows that the certificate of 1921 was pro tanto as certain and definite as a final certificate under Section 209(g) and no more subject to reopening or reduction by summary action.

The suggestion has been made that it would not be physically possible or practicable for the Commission to make a partial certificate under Section 212, as certain and as binding as we allege this certificate of 1921 to be, until its investigations were complete and it was ready to make its final certificate under Section 209(g). This is not so. The Commission might well find some items as to which it would feel certain at once, or with little investigation, and other items which are doubtful and require more detailed consideration. Without waiting to resolve the doubtful items, it might well make its partial certificate under Section 212 covering the certain items, or some percentage of them which would leave a reasonable margin of safety. Clearly this is what Congress intended, and what the Commission did and we submit that it had no jurisdiction thereafter to reopen or reduce this certificate by summary action.

If the Commission should suspect that there was some error or fraud in its original finding it might of course investigate the matter, reach a conclusion, and record it.

as a basis for action against the carrier based on mistake or fraud, and we would have no right to enjoin such action, because such an action would not purport to fix the legal status of the parties. But in this case the Commission has gone farther and issued what purports to be a binding certificate under Section 209 of the Transportation Act. The Treasurer and Comptroller General of the United States have accepted it and acted upon it as such. An order of this character is beyond the jurisdiction of the Commission and therefore subject to injunction.

Even if the Commission had jurisdiction to make an order of this character, calling for a refund by the carrier, its order in this case is erroneous because it failed to comply with the provisions of Section 209(c) of the Transportation Act, which govern its findings as to the proper amount to be charged against gross revenues and operating expenses, in determining net railway operating income. We allege four different respects in which the Commission's order violates the statute in this regard. We shall not attempt to outline these points here because they do not admit of sufficiently brief explanation, but will reserve them for discussion in the latter part of the brief.

Has the court jurisdiction to enjoin certificates of this character if satisfied that the Commission had no jurisdiction to make them or that they are otherwise erroneous?

We assert jurisdiction under the provisions of the Urgent Deficiencies Act, giving a specially constituted district court of three judges jurisdiction of actions to enjoin *any* order or requirement of the Commission. We realize that this court has pointed out in U. S. vs. Los Angeles and Salt

Lake R. R., 273 U. S. 299, and in other cases, that a court has no jurisdiction to enjoin a merely negative order, or a mere finding of fact which does not alter the legal status of the parties, but this court has frequently held that the district court has jurisdiction to enjoin orders which purport to change, create, or destroy legal rights.

We shall argue that the certificates in question purport to finally fix the status of the parties and create a legal obligation from the appellant to the Government; that they purport to create a cause of action which could be enforced by the mere production of the certificate and without further evidence, or used as an offset or counterclaim in the event of suit by the appellant against the Government. If the Commission had jurisdiction to make the order and if no errors of law were committed, the certificate would undoubtedly have this effect.

It is argued that these certificates are not orders because they are not so labeled, because they are directed to the Treasurer of the United States and not to the carriers, and because they do not order or command anyone to do anything. We shall argue that whether an instrument is an "order" depends upon its legal effect and not its label. An order is a written instrument signed by the Commission which creates, destroys or alters legal rights. This certificate has the same *legal* effect as though it had the word "order" at the top and as though it "ordered, adjudged and decreed" that the United States recover of the defendant a million dollars, or as though it expressly ordered defendant to pay the million dollars. By all legal tests it is an order.

It is argued that the machinery of the Commerce Court and of its successor the specially constituted district court

of three judges was intended to supplement the Commission's machinery for the regulation of commerce, and that the court's jurisdiction should not apply to orders issued under a Statute such as the Guaranty Act which is not a part of the Interstate Commerce Act, which does not regulate Commerce, and which confers a mere temporary authority to discharge a special function not connected with the regulation of commerce. Apparently, this argument would deny the court's authority to *enforce* special orders of this sort as well as to *enjoin* them. This argument treats the case as it would if the jurisdiction to fix the amount of the guaranty had been conferred upon some officers or branch of the government other than the Commission.

Our answer will be that in the Guaranty Act, Congress conferred on the Commission (and not on any other branch of the government) authority to determine the amount of this guaranty. The Commission upon which this power was conferred was the Commission as it then existed, with its existing machinery and procedure, including the procedure for review of its orders. Congress first declared in the Urgent Deficiencies Act that orders of the Commission might be enjoined. Later in the Guaranty Act it said that the amount of this guaranty should be determined by order of the Commission. It knew, when it said it, that orders of the Commission, without any limitation as to their character, were specially made subject to court injunction. It imposed this function upon the Commission probably because it considered the Commission peculiarly equipped to discharge it. If the Commission was peculiarly equipped to discharge the function in the first place, then it is equally reasonable to argue that the special court which reviews

other orders of the Commission is peculiarly suitable to review this one. At any rate, specific jurisdiction is given to review *any* order of the Commission, and if we are correct in arguing above that this certificate is an order, then it follows by expressed terms of the Statute that the court has jurisdiction.

It is argued that while the Urgent Deficiencies Act appears to give the court jurisdiction to enjoin *any* order of the Commission, this should be construed as limited to orders other than for the payment of money, because jurisdiction to *enforce* orders of the Commission are thus limited. It is said that the law contemplated a means of enforcing orders on the one hand and of enjoining them on the other hand and that these two actions were to be reciprocal and to apply to the same kinds of orders. It is said that since *enforcement* actions are limited to orders other than for the payment of money, *injunction* actions should be limited in the same way. It is argued that the reasons which induced Congress to limit the jurisdiction over enforcement actions in this way are equally applicable to injunction actions. These alleged reasons are that money awards involve only individual rights and not public interest so that their enforcement is properly left to individual action; and that money awards are, under Section 16(2), only prima facie evidence of the facts therein stated, and are, therefore, subject to collateral attack. It is said that these are the reasons why the *enforcement* of money awards is not vested in the special court, and that they are equally effective reasons why the special court should not be given jurisdiction to *enjoin* such orders.

Our answer to this is that the act is explicit in its terms. It expressly declares that the enforcement powers of the

court shall be limited to orders other than for the payment of money, but that the injunction powers shall apply to "any order."

As we have just pointed out it is argued that since ordinary money awards are only prima facie evidence of the facts therein stated and since they are, therefore, subject to collateral attack on the facts as well as the law, therefore, the remedy by injunction is not necessary and should not apply. But it should be noted that the provision that money awards are only prima facie correct, which appears in Section 16(2) of the Interstate Commerce Act, applies only to money awards *for violations of the Interstate Commerce Act*. Under Section 16(1) such awards are made only when "the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof." Even if it be granted that ordinary money awards for violations of the Interstate Commerce Act are not subject to injunction, for the reason just stated, it does not follow that these guaranty certificates, which are conclusive on matters of fact, should not be subject to injunction. They are much less open to collateral attack than an ordinary money award would be.

Even in the case of ordinary money awards, it may well be argued that Congress had a reason for providing for direct review by injunction. It would be possible to deny a direct review of *all* orders, and leave all errors to be corrected by collateral attack in enforcement actions. The direct review, however, certainly is more orderly, in the case of money awards as well as in the case of other orders. A money award might run against many parties in many parts of the country and a collateral attack might

be made in different courts with varying results. There is, therefore, good reason why full effect should be given to the express provision in the Statute that the special court should have jurisdiction of actions to enjoin any order or requirement of the Commission, even though it be an order for the payment of money.

In this particular case, there is an additional ground of equity jurisdiction which does not exist in the case of an ordinary money award. Paragraph 18 of the Petition shows that the government undertook to collect this refund by withholding a large number of items due the carrier for transportation of mail, passengers and freight, and that the carriers' only redress would have been by multiplicity of actions brought against the United States for the recovery of these items, in all of which the government would have pleaded the Commission's certificate of 1926 as a counterclaim. Even if the certificate would have been subject to collateral attack when set up in the counterclaim to each of these actions, a multiplicity of litigation of the same question might have resulted. Similar situations, of course, might arise in the case of any money award, and this is an additional reason why a direct review should be permitted through injunction proceedings.

Finally, it is argued that the jurisdiction over controversies with the government in general is provided for in other tribunals and by other statutes, and, therefore, it cannot lightly be assumed that Congress intended to confer jurisdiction over this particular controversy which involves the government, on this special court of limited jurisdiction. It is said that while the Urgent Deficiencies Act permits these suits against the United States in name, it was not intended to cover suits which are against the United States in substance as well as in name.

If this argument were sound it would apply equally to rate cases in which the government was a party. Our answer to it is that there is no such exception in the Urgent Deficiencies Act.

We shall argue that these last two contentions, based on the fact that the order involves the payment of money, and on the fact that the government is a party, are both resolved against the government in Dayton-Goose Creek Railway Co. vs. U. S., 263 U. S. 456. In that case the order was made under the recapture provision of the Interstate Commerce Act. It was an order for a money payment, and the payment was to be made to the government, so that both of the arguments to which we have just been referring would have been as applicable in that case as they are here. It is true that the order in that case also requested the carrier to report what provision it had made for setting up the reserve fund for one-half of the excess income, but it did not order or direct the carrier to take any action as to the part of the excess earnings which were to be retained by it. The only thing that the carrier was ordered to do was to pay money to the government, and yet this court sustained jurisdiction to enjoin the order. The case just referred to and the arguments which we have summarized in this outline will all be more fully discussed in the body of the argument.

ARGUMENT.

THE COURT'S JURISDICTION INCLUDES ORDERS FOR THE PAYMENT OF MONEY.

The jurisdiction of the court below was based upon the Commerce Court Act of June 18, 1910, (36 Stat. 1146) and upon the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208). Section 207 of the Commerce Court Act defined the jurisdiction of the Commerce Court in part as follows:

> "The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds: *First.* All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission *other than for the payment of money. Second.* Cases brought to enjoin, set aside, annul, or suspend in whole or in part *any order* of the Interstate Commerce Commission."

Section 208 of the Act, (36 Stat. 1149) provides in part:

> "Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States * * *."

It will be noted that the jurisdiction of the Commerce Court is defined as that "possessed by circuit courts of the United States" and it is therefore necessary to inquire

what jurisdiction the latter courts had in cases of this character.

The Hepburn Act of June 29, 1906, (34 Statutes 584), in Sections 4 and 5 amends Sections 15 and 16 of the Act to Regulate Commerce, February 4, 1887, (24 Stat. 379), as amended. Section 16 of the Act to Regulate Commerce, as thus amended, gives to the Interstate Commerce Commission power to make orders for the payment of money damages and provides that if the carrier fails to pay the complainant the amount so ordered, the complainant may institute an action for damages in the Circuit Court of the United States. It also provides:

> "If any carrier fails or neglects to obey any order of the Commission, *other than for the payment of money*, while the same is in effect, any party injured thereby, or the Commission * * * may apply to the circuit court * * * for an enforcement of such order.
>
> * * * the court shall enforce obedience to such order by writ of injunction, or other proper process, mandatory or otherwise * * *."

Immediately following this provision is one conferring jurisdiction on the circuit courts "to enjoin, set aside, annul or suspend *any order or requirement of the Commission*."

It thus appears that the *enforcement* of orders of the Commission is provided for (1) in the case of orders for the payment of money, by an action for damages in the circuit court and (2) in the case of orders other than for the payment of money, by application to the circuit court for enforcement of the order by appropriate process of the court. On the other hand there is a single general

provision providing for the *annulling* of *any* order or requirement of the Commission, without specifying whether it be for the payment of money or otherwise. This jurisdiction, as thus vested in the circuit courts, was transferred to the Commerce Court by the provision above quoted.

The Commerce Court was abolished by the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208) and the jurisdiction theretofore possessed by the Commerce Court was transferred to the various district courts of the United States (p. 219).

Section 208 of the Commerce Court Act quoted hereinbefore appears as Section 208 of the Judicial Code, (44 Stat. 869; U. S. C. 28:46) and varies from the portion hereinbefore quoted by substituting the words "district court" for the words "Commerce Court" in the Commerce Court Act, so that at the present time, the Judicial Code provides "that suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. * * *."

Consequently, the district courts now have jurisdiction: (1) to enforce any order of the Interstate Commerce Commission other than for the payment of money, and (2) to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.

THE COMMISSION'S CERTIFICATE IS AN "ORDER" WITHIN THE MEANING OF THE COMMERCE COURT ACT AND URGENT DEFICIENCIES ACT.

The amended order of the District Court of October 19, 1927, dismisses the petition for want of jurisdiction on two grounds, first, that the certificate is not an order within the meaning of the jurisdictional statutes, and second, that Congress has not consented that the United States be sued in the District Court in this proceeding.

Under Section 208 of the Judicial Code, the suit must be against the United States if the case is within the category therein stated. This is an express consent of Congress that suit may be brought against the United States in an action to enjoin, set aside or annul, an order of the Interstate Commerce Commission. We assert that the certificate is an order within the meaning of the jurisdictional statutes and we seek to enjoin it. It follows, then, that if we are correct in our assertion that the certificate is an order, the District Court is in error in its holding that Congress has not consented that the United States be sued in this proceeding.

The propriety of the court's action rests, then, upon the answer to the question: Is this certificate of June 8, 1926, an order within the meaning of the Commerce Court Act and the Urgent Deficiencies Act?

Counsel for the Government and the Commission below cited numerous cases in which the courts have held that acts of the Commission, which are orders in form, are not orders within the meaning of the Commerce Court Act, and counsel for the Government, intimated that we rely upon "the much-worn argument that *'any order'*

is justiciable under the Commerce Court Act." In support of their position that not every act of the Commission which is an order in form may be enjoined by the courts, counsel cited *Proctor & Gamble v. United States*, 225 U. S. 282, and various other cases. On the other hand we can cite many cases in which orders of the Commission have been enjoined. *I. C. C. v. Northern Pacific Railway Co.*, 216 U. S. 538, *I. C. C. v. D. L. & W. R. R. Co.*, 216 U. S. 531, *Southern Pacific v. I. C. C.*, 219 U. S. 433, *U. S. v. Diffenbaugh*, 222 U. S. 42, *U. S. v. B. & O.*, 231 U. S. 274, *Tap Line Cases*, 234 U. S. 1, *Philadelphia & Reading Ry. v. U. S.* 240 U. S. 334, *Central R. R. v. U. S.*, 257 U. S. 247, *U. S. v. New York Central*, 263 U. S. 603.

The cases just cited all involve orders made under the Interstate Commerce Act and so do the orders in the cases cited by the Government where injunction was refused. It is obviously true that there are some acts of the Commission which are orders in form which will not be enjoined. It is equally true that there are many acts of the Commission which may be enjoined. The problem, then, is to determine a rule from the decided cases and ascertain upon which side of the line our present case falls.

An excellent statement of the views of the court on this question appears in *I. C. C. v. Union Pacific R. R.*, 222 U. S. 541, at 547, as follows:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mis-

take of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the lementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent. v. I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The Court has sustained jurisdiction and has given relief from orders because of the consideration by the Commission of improper evidence or the failure to consider proper evidence. *U. S. v. Abilene & Southern Ry.*, 265 U. S. 274, *I. C. C. v. Louisville & Nashville R. R.*, 227 U. S. 88.

The provision of the statutes that jurisdiction to enjoin any order of the Commission is conferred upon the courts, and the foregoing decisions, would make the jurisdiction of the court seem very clear in this case were it not for the fact that notwithstanding the provisions of the statute some orders of the Commission have been held not to be within the jurisdiction of the court to review.

In considering what actions of the Commission are and what actions are not within the jurisdiction of the court, it is necessary to distinguish between cases in which jurisdiction has been refused and cases in which jurisdiction has been entertained but injunction denied. The motion to dismiss in this case raises both the questions. That is, the motion might be granted because of lack of jurisdiction of the court or it might be granted because, on the facts stated, the order is not one which should be enjoined. In resisting the motion, it seems incumbent upon us to discuss both questions. The latter question, as to whether upon the facts stated the order is one which should be enjoined, will be discussed in a later part of this brief. For the present we are discussing the question whether the court has jurisdiction and want to consider the cases upon that point.

A few of the numerous cases in which the court has held that it had jurisdiction but declined to give the relief sought are *Intermountain Rate Cases*, 234 U. S. 476, *Los Angeles Switching Case*, 234 U. S. 234, *United States v. Pennsylvania Railroad*, 266 U. S. 191. A recent case of this nature is *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. U. S.*, 48 Sup. Ct. Rep. 189, decided January 3, 1928.

These cases are clearly distinguishable from the class of cases wherein the court has held that the acts of the Commission complained of were not orders within the meaning of the jurisdictional statutes and, consequently, that the lower court had no jurisdiction.

There is a large class of cases in which an attempt has been made to enjoin an order of the Commission because of mistake of fact and in which the order has been considered by the court and jurisdiction entertained but the petition denied. We shall point out later that our case is not within that class and we simply mention these cases here in order to point out that they have no bearing upon the question of jurisdiction.

It may be stated generally that the cases in which injunction has been denied because of *lack of jurisdiction* are cases in which the so-called order of the Commission did not change the status or obligations of any individual or body and was therefore held to be not an order within the meaning of the statute. This general class of cases in which the Commission's order did not affect or change any status includes two or three sub-classes. One subclass is represented by *Proctor & Gamble v. U. S.*, 225 U. S. 282; *Hooker v. Knapp*, 225 U. S. 302, and *Lehigh Valley R. R. Co. v. U. S.*, 243 U. S. 412. In this class of cases the Commission had been asked to grant some affirmative administrative relief such as the establishment of a car service rule or the extension of time for a certain action, and declined to do so. Here a cancellation by the court of the Commission's order would amount to a granting by the court of the administrative relief requested, or else would leave the carrier in the same position that the Commission's order left it, and the same position in which

it was in before the Commission was appealed to for relief. The Commission's action did not change the status of the parties and was therefore held to be not an order. These cases are somewhat weakened by *U. S. v. New River Coal Co.*, 265 U. S. 533. Another subclass of such cases is that in which the order is merely procedural, as to set a case for hearing, but not changing any rights or obligations. *U. S. v. Illinois Central R. R.*, 244 U. S. 82. A third sub-class is represented by *U. S. v. Los Angeles & Salt Lake R. R.*, 273 U. S. 299, in which an order valuing railroad property was held to be a mere finding of fact by the Commission which was not binding upon any party and did not change its legal status. An examination of all of the cases in which the decision amounts to a denial of jurisdiction and not merely to a denial of the relief sought will disclose that in no one of them had any substantial rights of any of the parties been modified by the Commission's action. This thought is well expressed in the following language from the *Los Angeles & Salt Lake* case:

> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare *Smith v. Inter-*

state Commerce Commission, 245 U. S. 33. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later."

Contrasted with these cases, where the courts have refused to entertain jurisdiction, are the numerous cases of affirmative orders of the Commission which have been held subject to review. Thus where the Commission misconstrued the meaning of words or the kind of evidence necessary to establish a violation of the statute the Courts will correct the order. See *Southern Pacific v. I. C. C.*, 219 U. S. 433, where an order of the Commission cancelling a lumber rate was enjoined; and *I. C. C. v. N. P. Ry.*, 216 U. S. 538, where an order establishing through rates from Northern Pacific to Union Pacific points through Portland, Oregon, was enjoined; and *Philadelphia & Reading Ry. v. U. S.*, 240 U. S. 334, where an order finding certain rates to be discriminatory was enjoined on the ground that the Commission had erred as a matter of law; and *Central R. R. v. U. S.*, 257 U. S. 247, wherein the Commission found that the railroad was guilty of discrimination and the Commission's order was enjoined on the ground that the Commission had erred as a matter of law and that no carrier could be found to be guilty of discrimination, in violation of the Act, unless it is a party to the situation which is alleged to be preferential; *U. S. v. Diffenbaugh*, 222 U. S. 42, wherein the court enjoined an order by the Commission setting aside a railway company's allowance to a shipper for elevating his own grain though the allowance was reasonable and the service was a necessary part of the transportation, the order being

made upon the erroneous theory that it gave the shipper an unlawful advantage over shippers not owning elevators; *U. S. v. Baltimore & Ohio R. R.*, 231 U. S. 274, wherein a similar order of the Commission relating to free lighterage was enjoined; *U. S. v. New York Central R. R.*, 263 U. S. 603, wherein an order of the Commission prescribing passenger rates lower than the rates prevailing theretofore was enjoined because it appeared to be based upon an erroneous conception by the Commission of the intent of the law; *Tap Line Cases*, 234 U. S. 1, wherein the Commission had made an order prohibiting trunk lines from making certain allowances on traffic destined to companies owning the tap lines on the theory that the tap lines were plant facilities and not common carriers, the court holding that the definition of the term "common carrier" was a judicial question and that the Commission's conclusions thereon were subject to review as a question of law; *Interstate Commerce Commission v. D. L. & W. R. R.*, 216 U. S. 531, wherein an order of the Commission directing the construction of a connection between a branch line and another railroad on application of the branch line was enjoined because the statute giving authority to the Commission to make such orders required that an application must come from the shippers.

It is not necessary that the act complained of constitute a command or a direction in order that the court may have jurisdiction. If the act complained of is merely permissive, as giving a carrier a privilege which it would not have except for the Commission's act, but a privilege which it is not compelled to take advantage of, it may be enjoined. Thus in *Chicago Junction case*, 264 U. S. 258, the court upheld jurisdiction to review an order of the

Commission constituting a certificate permitting the New York Central to lease a terminal road in Chicago. Similarly, in *Colorado v. U. S.*, 271 U. S. 153, a certificate permitting a railroad to abandon operation over a portion of its line was held to be an "order." To the same effect is *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204. In *Home Furniture Company v. U. S.*, 271 U. S. 456, a certificate permitting acquisition of one railroad by another was held to be an order. In *Venner v. Michigan Central R. R. Co.*, 271 U. S. 127, it was held that an action by a stockholder seeking to enjoin the issuance of securities authorized by a certificate of the Commission was in effect an attempt to enjoin an order of the Commission and that the action would not lie unless brought in the manner provided for in the Urgent Deficiencies Act.

An excellent summary of the views of the court on this question is found in the *Los Angeles & Salt Lake* case, *supra*. Remember that this was a case in which the court held that a final valuation was not an order which could be enjoined. The court said however:

> "The so-called order here complained of is one which does not command the carrier to do or refrain from doing anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation."

If the order complained of can be brought within any of the foregoing classes the court has jurisdiction.

Plainly the certificate now before us does purport to

determine rights and obligations. If the Commission had jurisdiction to make this certificate and committed no errors of law in doing so, it follows that the effect of the certificate *ipso facto* is to create a cause of action in favor of the Government and against the Railway Company for $1,300,000. It is immaterial what the actual facts or the actual merits may be. We would be foreclosed from litigating them. The Government need merely bring its action and submit this certificate in evidence and its case is won. Or if we should sue for mail pay and the Government should set up a counterclaim, its counterclaim is established by the filing of this certificate. No showing of fact or equity with which we might wish to attack the certificate would be received. The valuation order in the *Los Angeles & Salt Lake case* was merely *prima facie* evidence and did not establish or deny any legal rights, but the certificate of the Commission in our case purports to be and, if valid, is a final adjudication of legal rights amounting to $1,300,000, and forecloses further litigation upon the question.

In the *Los Angeles & Salt Lake* case the court says of the Commission's valuation order—

> "It was merely preparation for possible action in some proceeding which may be instituted in the future—preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action arises. The final report may, of course, become a basis for action by the Commission, as it may become a basis for action by Congress or by the legislature or an administrative board of a State."

The certificate of the Commission in our case is much more than this. To be sure, it may become the basis for an action to recover a refund, but it, in itself, if valid, creates a cause of action, which is the very important distinction between the present order and the order in the Salt Lake case. This certificate purports to be, and, if valid, is a final adjudication of the rights of the parties with respect to this controversy.

According to the Government's contention, the certificate of June 8, 1926, creates a cause of action against the carrier and in favor of the Government for a refund of a portion of the payment previously made. The certificate of June 17, 1925, (Exhibit B of Petition, R. 23) expressly certifies that there is due to the United States on account of overpayment to the carrier the sum of $1,321,112.69. The final certificate of June 8, 1926, (Exhibit C, R. 24) omits a statement of the amount due to the Government but does certify a total amount necessary to make good the guaranty to the appellant which is substantially less than the total amounts previously paid.

The brief filed below by counsel for the Commission, in an attempt to show that this certificate is not determinative of rights and obligations within the meaning of the language used by the court in the *Los Angeles & Salt Lake Case*, *supra*, said:

> "In an analogous sense the certificate might be said to determine the rights and obligations under the guaranty section in that it determines the whole amount due, but like the valuation, it represents solely the exercise of the functions of investigation, for it is left to the Secretary of the Treasury to take final action upon the Commission's determination, such action involving an *independent judgment* at least as

> to the amount in fact due the carrier after giving consideration to the carrier's obligations on account of advances and partial payments already made it under the provisions of the guaranty section."

The above is not a correct statement of the effect of the Commission's certificate. The certificate represents more than the exercise of the functions of investigation, and it is not left to the Secretary of the Treasury to form an independent judgment,—not even as to the amount due. As we have pointed out above, the certificate purports to be a final disposition of the controversy as to the amount of the guaranty due to the carrier and the Secretary is bound to accept it as such. He could not raise or lower the amount of the Commission's estimate. Conceivably he might make up his mind that the Commission had no jurisdiction and proceed to disregard the certificate but he would do so at his own peril. Under no circumstances could he make a finding that the Commission's certificate was erroneous and proceed to substitute a determination of his own, because Sections 209 and 212 of the Act specifically direct the Secretary of the Treasury to pay all certificates made by the Commission, leaving him no discretion as to the amounts which shall be paid.

The situation is very similar to that in *Dayton Goose Creek Ry. Co. v. U. S.*, 263 U. S. 456. There the order of the Commission fixed the amount of the excess income of the carrier payable to the United States under the recapture provisions of Section 15a of the Interstate Commerce Act (as amended by the Transportation Act, 1920) (41 Stat. 488). This order, like our certificate, might later become the basis of an action at law, but nevertheless the

court in that case took jurisdiction and disposed of the case on the merits.

Counsel for the Commission took the position below that no act of the Commission is an "order" within the meaning of the Commerce Court Act unless the act is in performance of some duty or in the exercise of some power given to the Commission by the Interstate Commerce Act. Counsel states that Section 209 and Section 212 of the Transportation Act are not parts of or amendments of the Interstate Commerce Act and that consequently this court has no jurisdiction even though the certificate is of the category considered to be an "order" by the courts. No such limitation on the jurisdiction of the court can be found in the language of any of the jurisdictional statutes. They relate to any order of the Interstate Commerce Commission and the only limits on the jurisdiction of the District Courts which has ever before been made arise from the cases of negative and procedural orders which we have cited hereinbefore.

It is true that the cases where the court has declined to take jurisdiction or has assumed jurisdiction under the Urgent Deficiencies Act are all cases arising under the Interstate Commerce Act. These cases then throw no light upon the question whether the order must be made under the Interstate Commerce Act.

The right to enjoin unlawful acts or orders of administrative bodies or officials has been recognized by the Supreme Court. *O. R. & N. Co. v. Fairchild*, 224 U. S. 510. *N. P. Ry. v. Department of Public Works*, 268 U. S. 39. It is obvious therefore that the right to injunction applies in a proper case to an unlawful order or act either of the Commission or of any other administrative body purport-

ing to act under any law whatever. The only question is whether the case at bar is a proper case for injunction and not whether the order purports to be made under one Act or another.

The power to make certificates such as the one now before us was conferred by Congress on the Interstate Commerce Commission by the Transportation Act, 1920. At that time the Interstate Commerce Commission was an existing body with existing rules of practice and subject to certain laws of procedure and its acts were specifically made subject to review by the court. When the duty and power of making a determination as to the amount of the carrier's guaranty was conferred upon the Commission presumably Congress had in mind the Interstate Commerce Commission as established and functioning and as subject to all of the laws of procedure for review then governing it. One of the characteristics of this body on which the power of making a determination of the guaranty was conferred, was its subjection to review by injunction. We submit that this situation raises a strong presumption at least that Congress intended that an order determining the amount of the guaranty should be subject to the same procedure as any other order of the Commission and that in absence of any evidence of contrary intent the presumption should be conclusive.

Neither the Hepburn Act nor the Commerce Court Act nor the Urgent Deficiencies Act restrict the jurisdiction of the courts to orders made under the Interstate Commerce Act. Courts of the United States, inferior to the Supreme Court, must derive their jurisdiction from Congress, but when Congress has conferred jurisdiction on an inferior court in particular classes and kinds of

cases then the court has jurisdiction in cases of that class which arise under statutes subsequently passed. *In re Metzger*, Federal Case No. 9511. Just as the courts have power to review by injunction orders of the Commission made under amendments to the Interstate Commerce Act passed subsequent to the Urgent Deficiencies Act (*Chicago Junction case*, supra; *Colorado v. U. S.*, supra; *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204; *Venner v. Michigan Central R. R.*, supra) so has the court jurisdiction to review by injunction orders made by the Commission under any other acts giving powers to it.

If the act of the Commission which is sought to be reviewed is within the class which is held by the courts to constitute orders of the Commission, then the fact that it was made in performance of a duty imposed by some act other than the Interstate Commerce Act is not material.

Counsel for the Commission made the further point that this is merely an order for the payment of money and that since the jurisdiction of the court to *enforce* is limited to orders other than for the payment of money, the jurisdiction to *enjoin* is subject to the same limitation. Assume that this certificate is in fact merely an order for the payment of money, within the meaning of the Commerce Court Act—which is doubtful—still jurisdiction of the district courts is to *enjoin any order of the Commission*. The jurisdiction of the court to *enforce* extends to any order of the commission *other than for the payment of money*. Expression of the limitation in the case of the class of orders which may be enforced followed immediately by a designation of orders which may be enjoined without any such limitation would, under the usual rules

of statutory construction, show the intent of Congress not to include the restriction in the class of orders which may be enjoined. *Expressio unius est exclusio alterius.*

It is conceivable, of course, that Congress might have withheld any remedy whatever for direct review of any Commission orders, or it might have withheld such direct review in the case of orders for payment of money and granted it as to all other orders. Even in the case of orders which do not call for the payment of money, but which fix rates or grant other affirmative relief, if errors of law are committed by the Commission the carrier or party against whom enforcement is sought might have an adequate defense by collaterally attacking the order in the action brought to enforce it. In this respect orders for the payment of money do not differ from other orders. The remedy by collateral attack is just as available and no more available in one case than in the other.

In both classes of orders, however, the remedy by collateral attack is less orderly, and clean cut than a remedy by direct review. Several parties may be interested and collateral attacks may be made in several different courts with varying results. We can suggest no reason why Congress should have provided for a direct review in either class of cases except that it is more orderly than the method by collateral attack and this reason applies just as effectively in the case of orders for the payment of money as in the case of any other order.

The authorities establish the following principles relating to what constitutes an "order" which may be enjoined. If the act is simply a procedural step it is not an order. If it is a denial of administrative relief it may not be enjoined because the court is without power to grant ad-

ministrative relief since that power is lodged in the Commission. As expressed by the cases, a negative order will not be enjoined. On the other hand, if it is an act directing or permitting affirmative action or is an order purporting to fix liabilities, rights, obligations or duties, where but for the order there would be no such liabilities, rights, obligations or duties, then the district court has jurisdiction to enjoin it as an "order" under the Urgent Deficiencies Act. As expressed in the cases, *an affirmative or permissive order is subject to the court's jurisdiction.* If such an order is made by the Commission under a misconception of the law defining its powers or upon no evidence or improper evidence, then the court will exercise its power to enjoin, set aside or annul the order. Clearly the certificate in the present case is an affirmative order and the court has jurisdiction to hear and determine the case on the merits.

Whether this certificate is an "order" does not depend whether it is labeled "certificate" or "order" nor on whether it "orders, adjudges and decrees that the United States recover from the carrier" or simply certifies that the amount is due. Whether a horse is a horse depends upon its characteristics and not upon its label, and the same is true of an order. Technically an order is a written instrument, signed by the Commission and having certain legal effects. The legal effects of this instrument are identically what they would be if it were labeled an "order" and if it ordered the carrier to pay. Under either wording it creates the same obligation and with the same effectiveness and would be enforced in the same manner.

The reason why orders for the payment of money were excluded from the enforcement side of the Court's juris-

diction is apparent when it is remembered that an action for damages was provided for in the same section of the Hepburn Act and consequently jurisdiction to enforce orders for the payment of money was not otherwise necessary. On the other hand no reason appears in the statute for excluding orders for payment of money from the injunctive side of the court's jurisdiction.

To be Entitled to Injunctive Relief it is Not Necessary to Show that the Remedy at Law is Inadequate.

In the first sub-heading under the Argument in this brief we have pointed out that while in actions for *enforcement* of orders of the Commission a distinction is made between orders for the payment of money and orders other than for the payment of money, when we come to the provision regarding actions to *annul* or *set aside* an order of the Commission no such distinction is made. Jurisdiction is conferred upon the court in broad terms to annul any order or requirement of the Commission.

We have also pointed out that a remedy by direct review is more orderly than a remedy by collateral attack even in the case of money awards, because several parties may be interested and collateral attacks may be made in several different courts with varying results. It would have been possible to have left the aggrieved party to depend upon a collateral attack in actions to enforce any order of the Commission whether for the payment of money or not, but Congress saw fit to make a sweeping provision that "any order or requirement" of the Commission might be reviewed by injunction.

In the *Dayton Goose Creek case*, supra, the order sought to be enjoined requested the carrier to report to the Commission what provision it had made for setting up the reserve fund for one-half of the excess income and to remit the other half of the excess income to the Commission under the provisions of the recapture clause of Section 15a of the Interstate Commerce Act. The order complained of did not direct the carrier to do any particular thing with the one-half of the excess to be retained by it. The only direction requiring affirmative action related to that portion of the excess income payable to the United States under the provisions of the act. Any one of the reasons given as the basis for the request for the injunction could have been set up in an action at law brought by the Government to enforce its claim. Consequently the petitioner had an adequate remedy at law. The opinion of the court recites that the question of jurisdiction was not pressed on appeal. The court assumed jurisdiction and proceeded to dispose of the case on the merits.

It is true that the objection to jurisdiction was not pressed in the *Dayton-Goose Creek* case. But jurisdiction cannot be conferred upon a court by consent of the parties and even though the question of jurisdiction is not raised it is the court's duty to consider the matter of jurisdiction before proceeding with the merits. In *Chicago, Burlington & Quincy R. R. Co. v. Willard*, 220 U. S. 413, the court says:

> "It is firmly established by many decisions that in every case pending in an appellate Federal court of the United States, the inquiry must always be whether under the Constitution and laws of the United States that court or the court of original jurisdiction could take cognizance of the case."

In *M. C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, the Court says:

> "This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

Consequently the action of the court in the *Dayton Goose Creek case* in assuming jurisdiction is authority for the point that the court had jurisdiction even though there was an adequate remedy at law. The case seems entirely parallel to our own and clearly sustains the jurisdiction of the court in this case even though there may be an adequate remedy at law.

NECESSITY FOR RELIEF TO THE PETITIONER.

During the oral argument before the lower Court a question was asked from the bench whether we were not contending that the Commission's certificate of June 8, 1926, on which the Government's claim for refund is based, is an absolute nullity and, whether, if such be the case, there is any necessity for relief against something which is a nullity. A void order outstanding may become the basis of vexatious litigation on unauthorized acts performed in reliance on its purported validity. A direct review of such an order by injunction is recognized as proper in *Skinner & Eddy Corporation v. United States*, 249 U. S. 557.

In our petition we allege and claim five different grounds for cancellation of this certificate. One of these claims is that the Commission had no jurisdiction and that the certificate is therefore a nullity. But we also claim that even though the Commission had jurisdiction

to make the certificate calling for the refund, this particular order is erroneous and subject to judicial review because of errors of law in the interpretation and construction of statutes and contracts, and because of errors in considering improper evidence and in failing to consider other evidence, which we allege to be material and controlling.

An order which is erroneous for such legal reasons is not necessarily a nullity. It is like the judgment of a lower court which is subject to review for error of law but which is valid and enforceable until corrected upon review. While one contention which we make is that the order is a nullity, we are relying on various other contentions as to errors of law in the making of the certificate and we are entitled to be heard on these.

We have pointed out above that where errors of law are alleged to exist in an order of the Commission, while there may be an adequate remedy by collateral attack in an action brought to enforce the order, it is much more orderly and logical to provide a remedy by direct review. This is just as true of an order for the payment of money as of any other order. By express wording of the statute Congress has provided for such a direct review in the case of all orders.

The above reasoning is equally applicable where the error consists of an improper assumption of jurisdiction, as in the case of any other error of law. The Commission's action purports to be an order which may become the basis of vexatious litigation. Just as an appeal should be allowed from a judgment of a lower court made without jurisdiction, so orderly procedure requires a direct review of an order of the Commission made without jurisdiction.

An order of the Commission fixing intrastate rates, without a finding of discrimination against interstate commerce, would be a nullity for want of jurisdiction, but a means of direct review would be desirable. The policy of Congress and the express words of the statute seem to provide for such review. Therefore, even though no other errors of law were alleged in our petition, we still should be entitled to the injunction sought.

Before leaving this question of jurisdiction we desire to comment upon a suggestion made in the Court below by counsel for the Government. It will be noted that Exhibit D attached to the petition (R. 26) is an agreement under which the Comptroller General of the United States agreed that he would not attempt to collect the refund alleged to be due from the appellant under the Commission's certificate of June 8, 1926, by holding back moneys due from the United States to the appellant for transportation of mail, freight and passengers, in consideration of a deposit by the appellant with the Comptroller General of government securities sufficient to secure the said refund. Counsel for the Government intimated below that having made our solemn agreement with the Government depositing these bonds, the present action is an attempt to avoid the consequences of that contract. Obviously this is not so. The very purpose of the contract was to procure a release of funds due to us and give security demanded by the Government pending the outcome of an action which was then contemplated by the appellant. Notice that the contract specifically recites (R. 26) "* * * it is understood that an action against the United States to test the validity thereof (the Commis-

sion's certificate) is contemplated by the Railway Company." Further (R. 28), the contract states "The claim of the United States shall be deemed to have been finally determined, or a final determination thereof made, when it shall have been decided by the Court of last resort having jurisdiction thereof or shall have been settled by an agreement in writing between the parties thereto." Further, (R. 29), we agree not to bring any suit for the recovery or redelivery of the securities "saving and excepting such suit or action as may be necessary to be brought to determine the validity of said claim."

The Facts Alleged in the Petition are Sufficient to Establish the Conclusion that the Commission's Order is Erroneous.

One of the motions for the defense challenges the sufficiency of the facts alleged to establish error in the Commission's conclusion. If the defense is correct in contending that our petition contains insufficient facts the motion to dismiss will have to be granted. It therefore seems incumbent upon us to oppose this contention. We will point out briefly and without extensive argument wherein we believe that the order is in error, though this discussion goes rather to the merits of the case than to the question of the jurisdiction of the court.

The first ground upon which we claim the Commission's order to be erroneous is the contention already referred to, namely, that having issued its certificate finally ascertaining that at least $12,500,000 was due on March 1, 1921, the Commission was without jurisdiction thereafter to issue a further certificate in the nature of a conclusive finding,

purporting to be binding upon the Treasurer and the Comptroller General, that a lessor amount should have been found and that a refund was due. In raising this point we desire to make it clear that we are not contending before this court that the Commission's certificate of March 1, 1921, was conclusive in the sense that it could not be set aside for fraud or mistake of fact. It is not necessary to make any such contention as that. It may be subject to attack for mistake if the Government can allege and prove that a mistake was made. What we do contend, however, is that after such a certificate has been issued and payment made thereunder, neither the Commission nor any other department of the Government has been given authority to issue a fiat or order for refund which is *per se* binding and conclusive upon us, and that any attempt to issue a certificate or order purporting to have that effect is subject to injunction.

In order to test this question let us consider the status which would exist if, instead of a partial certificate under Sec. 212, a final certificate and payment had been made under Section 209g of the Transportation Act. Assume that such final certificate has been made and the amount thereof paid and that thereafter the Commission should attempt to issue an additional or supplemental certificate for a lesser amount and calling for a refund, and consider what the effect of such a supplemental certificate would be.

If the Commission would have power four or five years after making a final adjudication, to reopen the matter and make an adjudication for a smaller amount which would be binding upon the appellant, then it would have the same power ten years, fifty years or one hundred years later.

There is no statute giving it such power and no statute prescribing the time when such power must be exercised. It would be impossible to draw the line at the close of any particular period.

In order to determine the question whether the certificate of March 1, 1921, can be set aside by the Commission without any proof of fraud or mistake, it does not seem necessary to determine whether the original certificate is judicial or legislative or administrative in its nature, because we might admit that it is either and it would still be beyond the power of the Commission to set it aside by summary action.

If we regard the certificate of March 1, 1921, as judicial in its nature, and hold that the Commission was acting as a court, it would be going beyond any power ever exercised by any court to hold that the court can, four or five years afterwards, and on its own motion, without any finding of fraud or mistake, issue another judgment calling for a refund of a portion of the money paid under the first judgment.

If it be argued that the certificate of March 1, 1921, was made under a delegation of legislative authority, the Commission being empowered to complete the statute by filling in the amount of the guaranty, then it follows that if this authority has been exercised the power of the Commission is exhausted. If Congress itself had passed a grant of money it could not validly enact another statute at the following session reciting that its committee had made a mistake or that it had granted too much money and that the excess should be refunded. Certainly some allegation and proof of a mistake would be required in such a case.

If the act of the Commission be regarded as executive or administrative in its nature, like the award of public land, certainly title vests when the grant is made and cannot be recalled by subsequent executive or administrative action, at least without proof of mistake or fraud. No tribunal can make an award of that sort and still retain a string upon it.

Maxwell Land Grant Case, 121 U. S. 325, 379.

United States vs. California & Oregon Land Co., 148 U. S. 31, 43.

United States vs. Louisville, 169 U. S. 249.

Wright vs. Yuchausti & Co., 272 U. S. 640.

The case of *United States vs. Wildcat*, 244 U. S. 111, involved an enrollment made by the Dawes Commission under the provisions of the Curtis Act of June 28, 1898, and the Creek Agreement of March 1, 1901. It was held that this was conclusive unless impeached by very clear evidence of fraud or mistake. The court said (page 118):

> "In that act the Commission was authorized to investigate the subject, and its action when approved by the Secretary of the Interior was declared to be final. There was thus constituted a *quasi*-judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress by this legislation evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal lands. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commis-

sion was established and endowed with authority to hear and determine the matter.

"A correct conclusion was not necessary to the finality and binding character of its decisions. It may be that the Commission in acting upon the many cases before it made mistakes which are now impossible of correction. * * *

"When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter, upon the approval of the Secretary, should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake."

It has frequently been held that where matters are submitted to arbitration and an award made the authority conferred upon the arbitrator is exhausted and he has no power subsequently to reopen the matter and change the award. *Bayne vs. Morris*, 68 U. S. 97, 99; *United States vs. Farragut*, 22 Wall. 406, 419-420; *City of St. Charles vs. Stookey*, 154 Fed. 772; *Flannery vs. Sahagian*, 134 N. Y. 85; *Maud vs. Patterson*, 49 N. E. 974; *Moran Bros. vs. United States*, 61 C. Cls. 73, 99.

We know of no sort of a decision by any kind of a tribunal or body, duly authorized to act, and under which rights have vested, which can be set aside or reopened by summary action of the same body without express statutory authority and without proof of fraud or mistake.

Our right to this money became vested when the certificate of March 1, 1921, was made. We could have enforced payment of it at that time by mandamus proceed-

ings against the Secretary of the Treasury. *Kendall v. U. S.*, 12 Pet. 524. When the money was paid we had title to it, which we could defend against all comers. The money was subject to transfer by us and our title was complete in every way. It seems obvious, then, that no Government tribunal can create a valid cause of action for refund of a part of it by its mere unsupported fiat. There is no precedent in the whole field of law for the creation of a cause of action in that way. Whether a payment be made by the state or a municipality, or a corporation, or an individual, no right to refund exists except upon proof of fraud or mistake.

If a cause of action for this refund has arisen, it would be very difficult to classify it or to state what principle of law it depends upon. Neither tort nor contract is alleged or proven. There is no agreement, express or implied, no estoppel and no equity. The position of the Government is not only that it is not required to prove any mistake, but that we should not be permitted to negative any mistake in the original payment. Even though we are prepared to come into court and prove that no mistake was made and that we were underpaid rather than overpaid, the Government would claim that such allegations and proofs are immaterial and that on the mere fiat of the Commission the refund is due regardless of equities. We know of no other instance in the law where any Governmental body, judicial, executive, administrative or legislative, can create a cause of action by mere fiat without submitting proof of some sort.

To argue that there was an implied contract on our part to refund any excess if due, assumes that some excess is due, without proof, and begs the question. There

can be no implied contract in this case, and certainly there is no express contract and no tort. No action can be maintained in the nature of an action for money had and received without proof that too much money has been paid or that a mistake has been made.

The argument that the Commission's final finding is not conclusive, assumes a jurisdiction in the Commission to investigate alleged overpayments and to issue findings thereof. Such a jurisdiction can only be created by statute and such a statute would probably be unconstitutional. In any event we have no such statute and no authority whatever on the part of the Commission to make any further investigations or findings after final payment.

We have been discussing this question so far as though the order of March 1, 1921, were a final certificate issued under Section 209g instead of a partial certificate issued under Section 212. We submit, however, that the effect of a partial certificate under Section 212 is *pro tanto* the same as that of a final certificate under Section 209g. Section 209g provides that the Commission shall "ascertain and certify" the several amounts due and that the Secretary is authorized to draw warrants for the same. Section 212 provides that if the Commission is not able finally to determine the whole amount due it "may make its certificate for any amount *definitely ascertained* by it to be due" and that the authority of the Secretary of the Treasury to draw warrants is applicable.

Paragraph (a) of Section 212 seems to make it very clear, standing by itself, that a definite ascertainment made under its provisions, is as conclusive *pro tanto* as would be a final certificate under Section 209(g). But there is another provision which makes this even more

clear. Paragraph (b) of Section 212 provides that in the case of deferred debits and credits an estimate may be made which shall be *prima facie* but not conclusive. Deferred debits and credits include such items as liability for damage claims, taxes, etc., which are accrued on the books in some assumed amount at the time liability arises, but which can not be definitely ascertained as to amount until later. As to these items Section 212(b) permits payments to be made upon an estimate, but with an express provision that such estimates "shall be prima facie but not conclusive evidence of their correctness in amount in final settlement." If Congress had intended the entire finding under Section 212(a) to be only prima facie and not conclusive there would have been no object in adding Section 212(b). When it expressly declares in Section 212(b) that the estimate on certain specific items is only prima facie it infers that it is conclusive as to all others. *Expressio unius est exclusio alterius.*

A comparison of Section 212 with Section 209h confirms this reasoning. In Section 209h Congress makes specific provision for the possibility of mistake and provides for security for refund. This section provides for mere advances and not for definite payments. If Congress had intended, in Section 212, to provide for mere advances, it would have been necessary only to strike out the words "during the guaranty period" in Section 209h, thus making it possible to make advances, *after*, as well as *during* the guaranty period. The whole wording of Section 212 makes it very clear that Congress intended that the partial payments should be just as conclusive as a final payment.

In the decision in the Great Northern Guaranty Case, 111 I. C. C. 318, (R. 81) the Commission made an elaborate argument to the effect that its certificate of March 1, 1921, was issued hastily because the carrier was in need and that the matters were not fully considered. These may all be cogent reasons why Section 212 should not have been passed or why the certificate should not have been issued. But Section 212 was enacted and there is no ambiguity in it,—its terms are controlling. Congress knew that the Interstate Commerce Commission was not able to make a final certificate for the entire amount, but permitted it to make partial payments on supposedly safe margins. Congress deliberately assumed the risk of a possible mistake or overpayment. In the face of this statute, we submit that it is beyond the jurisdiction of the Commission, after making its certificate of March 1, 1921, and after the payment had been made thereunder, to issue a certificate to the Secretary of the Treasury for a lesser amount with the motive and intent and for the purpose of inducing the Secretary of the Treasury to bring action against us or to withhold payments due us.

In Finance Docket No. 1606, 70 I. C. C. 711, the Commission itself adopted the view which we are expressing here when it said on page 714:

> "We are required to make a definite ascertainment for partial payment purposes as clearly as we are required to make a definite ascertainment in final settlement."

OTHER GROUNDS OF INVALIDITY IN ORDER.

Aside from the contention which we have just been arguing, that the Commission's certificates of 1925 and 1926 were erroneous and subject to injunction because the Commission had no jurisdiction at the time to issue certificates in such form, in the face of their previous definite ascertainment of a larger sum, we allege several other errors of law which we believe are sufficient to invalidate these particular certificates, even though it should be held that the Commission at this time had jurisdiction to issue subsequent certificates for smaller amounts, without proof of fraud or mistake in the previous certificate. Assuming that the Commission had authority under Section 209(g), without proof of fraud or mistake in its previous certificate, to issue a final certificate for a smaller amount than that named in its original certificate, it was still obliged in making such final certificate to conform to the provisions of Section 209(c), which prescribes how its computations should be made. Our petition alleges several respects in which it failed to comply with these requirements. In considering these allegations of the petition it must be remembered that the motion to dismiss on the ground of failure to allege facts sufficient to state the cause of action is in the nature of a demurrer and consequently admits, for the purpose of the motion, all of the allegations of the petition. *Chicago Junction case*, 264 U. S. 258.

These errors of law are set forth in paragraphs XIV to XVII of our Petition, (R. 10-19 incl.) and our contentions with regard to them may be briefly summarized as follows:

Section 209 (c)-(1) guarantees a net railway operating income during the guaranty period equal to one-half of

the annual compensation under the Federal Control Act (40 Stats. 451) for use of the property during Federal control "including * * * the increases * * * provided for in Section 4 of the Federal Control Act." Section 4 provided that compensation during Federal control should be "increased by an amount reckoned at a reasonable rate per centum to be fixed by the President upon the *cost* of any additions and betterments, less retirements, and upon the cost of road extensions to the property of such carrier *made* by such carrier with the approval of or by order of the President while such property is under Federal control."

Suppose the Great Northern, at the beginning of Federal control, was in the process of constructing a new tunnel with a total cost of $1,000,000. On January 1, 1918, the beginning of Federal control, $900,000 had been spent but the tunnel was not yet completed to operate. During Federal control the tunnel was completed with an additional expenditure of $100,000. In this state of facts the Commission in computing the increased compensation under Section 4 allowed interest only on the $100,000 of expenditures made during Federal control. We claim interest on the full cost of $1,000,000, since that is in literal compliance with the section, being the *cost* of the addition. The addition *made* during Federal control was the completed tunnel.

The literal application of the section conforms with the equities of the situation. Additions are made to reduce operating expenses and consequently to increase net income. Since the uncompleted tunnel had no effect on operating expenses during the test period (the years July 1, 1914, to June 30, 1917, used as a basis in fixing Federal

control compensation), the net income during the test period, and consequently the compensation during Federal control was less than if the tunnel had been in use. To measure the benefit derived from the use of the tunnel during Federal control, the increased compensation must be based on the full cost of the tunnel. Our interest payments are increased by, say 5% on a million dollars worth of bonds issued to finance the tunnel, with the expectation that the net profit from railway operations will be increased sufficiently to more than offset this added interest. The Government received the entire increase in the profit from railway operations, which presumably exceeded the interest on the entire expenditure for the tunnel, but offers to pay the carrier increased compensation based only on one-tenth of the cost, leaving the carrier to bear the burden of interest charges on the other nine-tenths.

This is an error of law and not one of fact because it results from a misinterpretation by the Commission of the provisions of Section 4 of the Federal Control Act, providing for increased compensation based on "cost" of improvements "made * * * while such property is under Federal control."

This illustrative case of the tunnel is typical of the claim we make in Paragraph XIV of the Petition, (R. 10) of error in the certificate.

The claim in Paragraph XV (R. 12-14) involves this situation. Paragraph (f)-(3) of Section 209, provides that in measuring the maintenance expenses which may properly be used in determining the guaranty the Commission shall apply the rule of Section 5(a) of the standard Federal control contract. Congress sought to avoid extravagant maintenance charges during the guaranty period,

which would decrease net income and consequently increase the amount necessary to make good the guaranty.

Section 5(a), of the Federal Control Contract (R. 12), paraphrased, provides that during the period of Federal control the Director General shall as nearly as practicable, expend for operating expenses or pay into funds sums which may be necessary in order that the property may be returned to the owner at the end of Federal control in substantially as good repair as it was on January 1, 1918, the beginning of Federal control; "provided, however, that the annual expenditure and charges for such purposes during the period of Federal control on such property * * *, or the payment into funds of an amount equal in the aggregate (subject to the adjustments provided in paragraph (c) and to the provisions of paragraph (e) of this section) to the average annual expenditure and charges for such purposes included under the accounting rules of the Commission in railway operating expenses during the test period, * * *, shall be taken as a full compliance with the foregoing covenant."

The adjustments called for in paragraph (c) referred to are shown in the following quotation (R. 13):

> "In comparing the amounts expended and charged under the provisions of paragraphs (a) and (b) of this section with the amounts expended and charged during the test period, due allowance shall be made for any difference that may exist between the cost of labor and materials and between the amount of property taken over and the average for the test period, and, as to paragraph (a), for any difference in use between that of the test period and during Federal control which in the opinion of the Commission is

substantial enough to be considered, so that the result shall be, as nearly as practicable, the same relative amount, character, and durability of physical reparation."

In applying this rule to determine the maintenance expenses which should be allowed in fixing the amount necessary to make good the guaranty, the Commission determined an equation factor (which will be referred to in more detail on other pages) to represent the difference "between the cost of labor and material" in the test period and the guaranty period, respectively. Then, to determine the amount of maintenance which should be allowed during the guaranty period, the Commission applied this equation factor to one-sixth of the total expenditures for maintenance during the test period. The result, then, is that the maintenance allowance is based on six average months of the full three-year test period, necessarily reflecting the experience of the carrier as to maintenance during the fall and winter months as well as the experience during the spring and summer months. Our contention is that a maintenance allowance for the six months —March to August, inclusive,—of the guaranty period, which shall "as nearly as practicable" represent "the same relative amount, character, and durability of physical reparation" as was made during the test period, must give effect only to the carrier's experience during the corresponding months of March to August, inclusive, in each of the three years of the test period.

Because of climatic, operating and traffic conditions on the Great Northern, the great bulk of the work of maintenance of way and structures, which includes the main-

tenance of roadbed and track, bridges, buildings and other structures, is performed during the late spring and early summer months of each year (R. 14). The court will appreciate why it is impossible in this northern climate, where the road and track are frozen solid for a large portion of the year, to do any track maintenance work in the winter months. Necessarily the work must be concentrated in the warmer months. To make an allowance based in part on the low winter expenditures is to fail to reflect accurately the actual experience of the carrier in the test period.

The evidence will show that the condition on the Great Northern is extreme and that in other portions of the western territory conditions are such that the carriers can distribute their maintenance expenditures more uniformly throughout the year. Consequently, the application of the Commission's rule will be a less serious matter to carriers whose conditions are not as extreme as ours are.

This error of the Commission is one of law and not of fact because it is a misinterpretation of the provisions of the Federal Control contract hereinbefore quoted, which provide that the annual expenditure for maintenance during the period of Federal control shall be equal to the average annual expenditure during the test period, to the end "that the result shall be as nearly as practicable the same relative amount, character and durability of physical reparation." It was necessary to adapt this provision for "annual expenditure" to a six-months period, which necessarily involved an interpretation of the statute, as to which the only guide is the statement requiring the same relative amount, character and durability of physical reparation.

The Commission not only failed to adopt what we believed to be the proper construction of the statute but it went farther and assumed that the opposite construction was definitely established by the statute. It said (111 I. C. C. 318, 325) (R. 90) "in any event such a claim could not be considered because the law definitely fixes as a base the average six months of the three-year test period." It is quite obvious that whether we are right or wrong in our construction, the Commission is wrong in assuming that the law definitely fixes the contrary. Where the Commission has made a decision and it affirmatively appears that in making the decision the Commission was acting under a mistaken view of the law, this is sufficient ground for the enjoining of the order. *U. S. v. New York Central*, 263 U. S. 603.

The opinion of the Commission that the law definitely fixes an average six months of the test period as the base is evidently based upon the fact that under Section 209 (c) (1) of the Transportation Act the amount of compensation guaranteed to the carrier is one-half of the annual compensation named in the Federal Control contract, which would amount to the net income for an average six months of the test period. But the Commission overlooks the fact that the statute is here speaking of *net* income and not of expenditures for maintenance. There is no corresponding provision covering expenditures for maintenance.

It might be assumed that an analogy exists between net income and expenditures for maintenance or that any error involved in using an average six months in the computation of income would be offset by likewise using an average six months in the computation of maintenance

expense. As a matter of fact, however, the reverse may be true. In order to illustrate this let us assume the case of a carrier which operates only in the summer, such as a summer resort railroad or logging railroad, and which earns its entire income and incurs all of its expense during the months from March to August, inclusive. Such a carrier during 1920 would have earned its entire year's income during the six months of the guaranty period but under the guaranty it would receive only one-half of a year's income. If such a railroad had accepted the provisions of the Guaranty Act it would be compelled to pay the other half of its earnings over to the Government. This illustration makes it clear that the use of an average six months of the test period in computing net income for the guaranty period may work an injustice to the carrier.

On the other hand this carrier which likewise incurred all of its year's expense during the six months of the guaranty period, would receive from the Government only half of such expenditures. The injustice wrought by Section 209(c) (1) using an average six months as the basis of income would not be offset by likewise using an average six months as the basis for expenditures, as the Commission has done, but would, on the contrary, be increased and magnified. The same thing would be true of an all the year road which had its heaviest income and expense in the summer months.

If we assume the case of a railroad carrying on all of its business in the months from September to February, inclusive, such railroad in 1920, would have earned its regular normal income for the full year in the months outside of the guaranty period and in addition would receive from the Government under the Guaranty Act a bonus

of one-half of a year's income. This carrier would incur no expense during the months of the guaranty period but the Commission's method of computing expenditures for maintenance would nevertheless allow it one-half of the amount which it expended annually during the test period although its actual expenditure during the guaranty period was nothing. It would thus receive a bonus under Section 209 (c) (1) in the computation of its net income and would be given another bonus by the Commission's method of computation, equal to half of its annual maintenance expenses. These illustrations make it clear that there is no proper analogy between the method of computing income which is adopted by Section 209 (c) (1) and the method of computing expenditure which should be adopted under Section 209(f) (3), and that instead of the Commission's error tending to offset or correct any injustice under Section 209(c) (1) it may tend to distort and magnify.

Another error of law charged in the petition appears in paragraph XVI of the complaint (R. 16). We have already pointed out that Section 209(f) (3) required the Commission to make allowance for maintenance expenditures during the guaranty period and provided that in making such allowance it should be governed by Section 5 (c) of the Federal control contract. That section provided that due allowance should be made, among other things, for differences in the cost of labor and material between the two periods (R. 13). The question of law involved is whether this language refers to differences in labor and material costs necessarily incurred by the carrier under consideration or whether it refers to differences in the general level of such costs. We allege

that the Commission refused either to determine or to give controlling effect to the differences existing in the costs necessarily incurred by the Great Northern and that instead it determined a factor for increase which reflected the general levels or the experience of other carriers.

In support of our contention that the provisions of the statute and of the Federal Control contract necessarily referred to the costs necessarily incurred by the individual carrier we point to the fact that the Federal Control contract was not a blanket contract made with several carriers, but that it was in each case made with an individual carrier and necessarily referred to the costs incurred by that carrier. We also point to the proviso: "That the result shall be, as nearly as practicable, the same relative amount, character and durability of physical reparation" (R. 13). An application of this proviso requires that the differences in costs necessarily incurred by the individual carrier be given controlling effect.

The erroneous results of the Commission's method may be made clear by the following illustrations: Suppose that, on the average, wages were trebled and material costs were doubled. A carrier which used labor and material in equal proportion would have an average equation factor of 2.50 but a carrier which used twice as much labor as materials would have an equation factor of 2.67. The increase in the price of any given kind of labor or any given kind of material might be the same on both roads but the proportion of high cost items and low cost items might vary. Moreover, the cost of rails and ties at the point of production may have trebled while the freight rates incurred for carrying them to the point of consumption in fact only increased approximately 40%. On a

road located near the region of production the costs would consist almost entirely of the amount paid to the manufacturer and would have doubled or trebled. On a road located far from the region of production the cost might consist more largely of transportation costs, which would have increased only 40%. The petition alleges that because of differences in the proportion of high cost and low cost items and other similar differences which were peculiar to the Great Northern its necessary equation factor was as a matter of mathematical demonstration substantially different from and independent of the factors for other railroads and that nevertheless the Commission refused to determine an equation factor for the Great Northern, but simply determined an equation factor for other railroads and applied it to the Great Northern with no allowance, or an insufficient allowance, for the peculiar conditions existing on the Great Northern. We believe that the court must find as a matter of mathematical demonstration that this was either an illegal and erroneous method or that the conclusions are illegal and erroneous because contrary to the mathematically demonstrable and undisputed evidence. The Commission's method produced a factor of 2.45 whereas the factor mathematically demonstrable from conditions existing on the Great Northern is 2.57. This involves a difference of $1,000,000 in the computation of the guaranty.

Paragraph XVII of the Petition (R. 18) has to do with the effectiveness of labor. Our claim is in no way based upon any difference between the efficiency of an hour's labor in the test period and an hour's labor in the guaranty period. An illustration will best describe this claim. Let us suppose that during the test period a man received

50 cents an hour for a 10-hour day, or a total of $5 per day. Of this 10 hours, one hour was consumed in getting to and from the work, getting started on the work and closing up at the end of the day. This leaves 9 effective hours of work for which he is paid $5, which is at the rate of 55.5 cents per effective hour. Assume that the man doing the same kind of work received 50 cents an hour during the guaranty period for an 8-hour day, or a total of $4 per day. Again one hour would be consumed in getting to and from the work and in starting and closing up the job, leaving 7 effective hours, which would be at the rate of 57.1 cents per effective hour. In this situation the Commission would determine an equation factor of 1.00 (50:50) as the difference "between the cost of labor" in the two periods, whereas we assert that the equation factor should be 1.03 (57.1:55.5). Of course, the hourly rates in the test period and the guaranty period were not the same, but the foregoing example illustrates the effect of the Commission's method and the method which we assert should be used, and this same effect would be present if we used the actual rates paid during each of the two periods.

Under the allegations of the petition it is a matter of mathematical demonstration that the Commission's conclusion is erroneous in this respect. The Commission is called upon to apply the provisions of the Federal Control contract which provide for due allowance for differences in the cost of labor. The contention which we make involves a legal interpretation of this provision. The Commission holds that "cost of labor" is synonymous with "price of labor per unit of time paid for," while we contend that the phrase is synonymous with the phrase "cost

per unit of work accomplished." This is a question of legal interpretation which should be passed upon by the court. The petition alleges, and we are prepared to prove by submitting the Commission's own language, that it made no attempt to determine the difference in costs per unit of work accomplished but that it determined instead merely differences in costs per unit of time paid for.

We do not ask that this court find as a fact the amount necessary to make good the guaranty. We simply ask the court to state the correct rules of law, and, if it determines that the Commission has erred as a matter of law, to enjoin the erroneous certificate.

CONCLUSION.

For the foregoing reasons we submit that the lower court, sitting pursuant to the Urgent Deficiencies Act, had jurisdiction, and that it was necessary that the jurisdiction should be exercised in order to prevent serious and irreparable injury to appellant, and we pray this court to reverse the order and remand the case to the lower court with directions to exercise the jurisdiction which that court possesses and to consider the appellant's petition upon its merits.

Respectfully submitted,

F. G. DORETY,
THOMAS BALMER,
FLETCHER ROCKWOOD,
Solicitors for Appellant.

St. Paul, Minn.,
Mar. 30, 1928.

APPENDIX A.

TEXT OF PORTIONS OF SECTIONS 209 AND 212 OF TRANSPORTATION ACT, 1920.

Sec. 209(a) When used in this section—

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; the term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and

The term "railway operating income" and other references to accounts of carriers by railroad shall, in the case of a sleeping car company, be construed as indicating the appropriate corresponding accounts in the accounting system prescribed by the Commission.

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the

Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in section 1 of the Federal Control Act;

* * * * *

(d) If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (1), (2), or (4) of subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (3) of subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under section 4 of the Federal Control Act, such carrier shall forthwith pay the amount

of such excess into the Treasury of the United States. The amounts so paid into the Treasury of the United States shall be added to the funds made available under section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period.

(e) For the purposes of this section railway operating income, or any deficit therein, for the test period shall be computed in the manner provided for in section 1 of the Federal Control Act.

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

(1) Debits and credits arising from the accounts, called in the monthly reports to the Commission equipment rents and joint facility rents, shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are not under Federal control at the time of termination thereof, shall be excluded;

(2) Proper adjustments shall be made (a) in case any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and whose railway operating income was included in such income of the carrier for the test period, do not continue to be a part of such railroad or system of transportation during the entire guaranty period, and (b) in case of any lines acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period

and prior to the expiration of the guaranty period, for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period;

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

(4) There shall not be included any taxes paid under Title I or II of the Revenue Act of 1917, or such portion of the taxes paid under Title II or III of the Revenue Act of 1918 as by the terms of such Act are to be treated as levied by an Act in amendment of Title I or II of the Revenue Act of 1917; and

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each

carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

* * * * *

SEC. 212. [*Added February 26, 1921.*] (a) In making certifications under section 204 or section 209, the Com-

mission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.

APPENDIX B.

Letter Submitted by Hon. Edgar E. Clark.

Interstate Commerce Commission,
Washington, January 22, 1921.

Hon. John J. Esch,
Chairman Committee on Interstate and Foreign Commerce, House of Representatives.

Dear Sir:

This morning Representative Sims, member of your committee, called and discussed with me some features of H. R. 15713, more particularly paragraph (b) of Section 212.

Mr. Sims thought that there was difference of understanding as to the intent of the language in this paragraph, and he asked that I write you my conception of the manner in which, if enacted in its present form, it would be interpreted and applied by the Commission.

Paragraph (a) of Section 212 very definitely authorizes certificates in partial payment and payment of such certificates. It will be noted that such certificates are by the terms of this paragraph to be "for any amount definitely ascertained by it (the Commission) to be due." I think there is no misunderstanding in that language. There is no room for misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of an amount "definitely ascertained" by us to be due the carrier.

Paragraph (b) provides that as to deferred debits and credits which can not at the time be definitely determined

the Commission may when it is deemed practicable make a reasonable estimate of the net effect of such deferred debits and credits and when agreed to by the carrier or express company to use such estimate as a definitely ascertained amount in certifying sums payable and provides that such estimates so agreed to shall be binding in final settlement.

Judge Sims thinks that this language is susceptible of interpretation which would authorize the Commission to make estimates of deferred debit and credit items in connection with partial payments, leaving other deferred debit and credit items for consideration in connection with other or further certificates or final settlement. I think that the language is susceptible of that interpretation, but I do not understand that the Commission has any thought of so using it, and I do not conceive that the Commission would so use it. The authority is permissive. The paragraph contemplates making a reasonable estimate of the net effect of such deferred debit and credit items and using them under agreement with the carriers as a basis for a final settlement. Under that permissive authority the Commission would be under the moral obligation to preserve to all reasonable extent the interests and welfare of the Government, and it would be its purpose so to do. The amount of money involved in the deferred debit and credit items is not a large item as compared with the amount of the guaranty. The purpose of this paragraph, as I understand it, is to make possible speedy and final settlements under terms fair to the carrier and fair to the Government, and to make final settlement under such an agreement rather than to have some of these claims drag along for many months or years waiting the final determination of

the debit and credit items, which final determination might in small measure affect the balance.

Yours very truly,

EDGAR E. CLARK,
Chairman Interstate Commerce Commission.

(Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, Sixty-sixth Congress. Third Session, on H. R. 15551 and H. R. 15713, January 14 and 15, 1921, pp. 108-109.)

APR 27 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 612.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Appeal From the District Court of the United States for the District of Minnesota.

REPLY BRIEF OF APPELLANT.

F. G. DORETY,
THOMAS BALMER,
FLETCHER ROCKWOOD,
Solicitors for Appellant.

Dated April 23, 1928.

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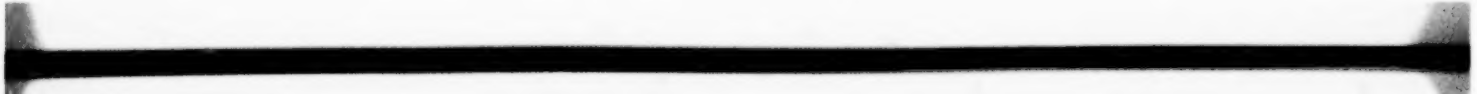

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GREAT NORTHERN RAILWAY COMPANY,
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THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Appeal From the District Court of the United States for the District of Minnesota.

REPLY BRIEF OF APPELLANT.

In the brief filed on behalf of the Interstate Commerce Commission, counsel argues that the guaranty certificates in question here, if they are to be considered as orders of the Commission at all, are at most orders merely for the payment of money which would be enforceable in an action at law. It is argued that whenever the Government may bring such an action we can set up as a defense the errors of law the Commission may have committed in mak-

ing the orders, and that we therefore have an adequate remedy at law, and are not entitled to bring an action on the equity side of the court to set aside the certificates.

The Helpburn Act declares that "jurisdiction to hear and determine" suits to set aside "any order or requirement" of the Commission "is hereby vested" in the Circuit Courts. Whether this was intended to create a right of review in all cases where the Commission's order purported to affect any legal rights of the parties, and regardless of whether an adequate remedy existed at law, is a question that need not be discussed here. The government has contended in the negative, at least in the case of awards of reparation—but the Commerce Court asserted jurisdiction, even in such cases.

Southern Ry. Co. v. U. S., 193 Fed. 664.

Arkansas Fertilizer Co. v. U. S., 193 Fed. 667.

We Have No Adequate Remedy at Law.

Even if this argument would be sound in the case of ordinary reparation awards of the Commission, nevertheless, it is not applicable to these guaranty certificates. It is true that all questions of law can be taken advantage of in defense of a legal action to enforce an award of *reparation*, but this would not be true in an action to enforce a guaranty certificate. It is true in the case of reparation awards because, by the terms of the statute, they are made merely "*prima facie* evidence of the facts therein stated." But this provision is a part of paragraph (2) of Section 16 of the Interstate Commerce Act, and under the terms of paragraph (1) it is applicable only where "the Commission shall determine that any party

complainant is entitled to an award of *damages under the provisions of this act for a violation thereof.*" (Italics ours.)

Section 209 of the Transportation Act, which contains the guaranty provisions, is not a part of the Interstate Commerce Act, so that the guaranty certificate is not an award of damages under the provisions of the Interstate Commerce Act for a violation thereof. It is not an award of "damages" at all, nor does it involve a "violation" of the Interstate Commerce Act, or of any other act. Therefore, paragraphs (1) and (2) of Section 16 of the Interstate Commerce Act, do not apply to Guaranty Certificates, and there is no provision of any other statute making them merely *prima facie* evidence of the facts therein stated. On the contrary, Section 209 (*g*) of the Transportation Act provides:

> "The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty of each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated."

It will be noted from the above that the certificate in itself makes it the duty of the Secretary of the Treasury to draw warrants. If he should refuse to do so, mandamus would lie. *Kendall v. U. S.*, 12 Pet. 524.

If the certificates of 1925 and 1926, which are in question here, are not erroneous in law, and if the Commission

had jurisdiction to make them, we take it that they would be conclusive upon us in an action by the Government to enforce a refund. They would in themselves constitute a cause of action or fix the amount of recovery, and we could not relitigate questions of fact, nor could we ask the court to make a computation of its own. In this respect, they have an effect similar to that of Commission orders fixing future rates, which, under paragraph (12) of Section 16, are enforceable at their face value, if "regularly made and duly served." Such orders are more than merely *prima facie evidence* of the facts which they state.

In this respect, also, Guaranty Certificates would seem to be analogous to an award of arbitrators, to an architect's certificate under a building contract, or to an appraiser's finding of value under an insurance policy.

It is well settled that mistake of law in the making of such awards or certificates is never a defense which can be set up in an action at law brought to enforce them. It is not always that a mistake of law affords a valid ground for attack against an award, but whenever it is a valid defense, it is well settled that it can only be availed of by an equitable proceeding for the cancellation of the instrument. For example, a failure of arbitrators to hear and consider proper evidence cannot be set up as a defense in an action at law, and there is, therefore, no adequate remedy at law in such a case. *Cohen v. Wemme*, 47 Or., 146; 81 Pac. 981.

In *Jessup and Moore Paper Co. v. Reed and Bro. Co.*, 10 Del. Ch., 146; 87 Atl. 1011, the defense was that the award was invalid because of the receipt of evidence through an improper channel. On page 1012, the court said:

> "It is clear that the court of chancery has jurisdiction and is the proper and only tribunal to hear and determine whether the award should be set aside, inasmuch as the reasons urged therefor by the bill are not available as a defense to an action at law on the award. *Russell on Arbitrators*, 509."

In *Hartford Fire Insurance Co. v. Bonner Mercantile Co.*, 44 Fed. 151, one of the arbitrators had failed to comply with proper procedure. The court held that this would not be a legal defense, saying:

> "Where the arbitrators are guilty of misconduct which does not affect what may be called their 'jurisdiction' and which does not appear on the face of the award, that is prior to the statutes above named" (permitting equitable defenses to be pleaded in law actions), "the award could be set aside only in a court of equity upon a proper bill."

This was affirmed by the circuit court of appeals in 56 Fed., 378, without discussion of this point, and certiorari to the Supreme Court of the United States was denied in 154 U. S., 504.

Other cases in which courts of equity have sustained jurisdiction to cancel an award because of errors of law, or errors in considering improper evidence, or failing to consider proper evidence, are the following: *Roberts Bros. v. Consumers Can Co.*, 102 Md., 362, 62 Atl., 585; *Frick v. Christian Co.*, 1 Fed., 250; *Goff v. Goff* (W. Va.), 89 S. E., 9; *Alameda County Water Dist. v. Spring Valley Water Co.*, 67 Cal. App., 533, 227 Pac. 953; *Lewis v. Chicago, S. F. & C. R. Co.*, 49 Fed., 708; *Utah Construction Co. v. Western Pacific Railway Co.*, 174 Cal., 156, 162 Pac., 631; *McLaurin v. McLauchlin*, 215 Fed., 345. Even where there are statutory provisions for enforcing awards,

and where the statute permits of an equitable defense in such action based on fraud, it has been held that the statutory remedy was cumulative merely, and not exclusive, and that resort to equity is not impaired or curtailed by the statutory remedy. *Shawhan v. Baker*, 167 Mo. App., 25, 150 S. W., 1096.

The same rule, that the award or certificate can be set aside only in an action at equity, and that irregularities not appearing on its face cannot be availed of in a defense of an action at law, is applied in cases where the attack is based, not upon mistake of law, but upon fraud, mistake of fact, or other equitable grounds. In *Wood et al. v. Chicago, S. F. & C. R. Co.*, 39 Fed., 52, the court said:

> "Such provisions in contracts being binding, the next question is whether an estimate made by an engineer in accordance with such a stipulation can be avoided in a strictly legal proceeding by proof of fraud, gross negligence, or mistake? Of course, if an estimate thus made is regarded in the light of an award made by an arbitrator, the authorities are practically all one way,—that recourse must be had to a bill in equity, and that neither fraud nor mistake can be alleged or proven to avoid the estimate, in a suit at law on the contract to recover a balance claimed to be due. The best-considered cases on the subject, so far as my observation extends, treat estimates (especially final estimates) made by an engineer in pursuance of such provisions, as an award that can only be avoided in chancery. *Herrick v. Railroad Co., supra; Kidwell v. Railroad, supra; Railroad Co. v. Veeder, supra; Grant v. Railroad Co.*, 51 Ga., 353.
>
> "In several cases, bills have been entertained to avoid erroneous estimates on the ground of fraud and mistake, without a question as to the propriety of such a procedure, and, if equity has jurisdiction in such

cases, it is clear that a court of law has not. *Vide* cases above cited, and *Sharpe v. Railway Co.*, L. R., 8, Ch. 597."

In *Lerin v. Northwestern National Insurance Co.*, 146 Fed., 56, the court said:

"Whether or not an award of arbitrators may be successfully assailed in a court of law is a question upon which there is some confusion in the authorities. This arises mainly, if not wholly, from the fact that under the reformed procedure awards have been defeated upon equitable grounds in law actions; but this is because equitable defenses are permissible in such actions under the Code. While it has long been settled that courts of law have concurrent jurisdiction with courts of equity in matters of fraud, yet in the national courts, where legal and equitable remedies cannot be blended in one proceeding, it is generally held that relief against awards or other instruments in writing importing a consideration, upon the grounds of fraud, which does not touch the execution of the instrument, must be obtained in equity."

In *Cook v. Foley*, 152 Fed., 41 (C. C. A. 8th Cir.), the court said:

"Again, final estimates made by engineers in pursuance of a contract between the parties making such estimates final and conclusive when made the foundation of an action at law, or when interposed as a defense to an action at law, cannot be assailed in such action for fraud, such gross mistakes as imply bad faith, or a failure to exercise an honest judgment on the part of the arbitrators, or other like extrinsic matters, if objection to such method of attack be timely made; *but for such relief* resort must be had to a court of equity" (citing among other cases, *Wood v. Ry.*).

"Not only has this precise question been ruled, but the very fact that courts of equity have invariably assumed jurisdiction to determine the validity of estimates made by engineers in pursuance of contracts making their findings final, conclusive, and binding between the parties when sought to be impeached for fraud or other extrinsic matters, is conclusive evidence that a court of law has no jurisdiction over such matters if objection thereto be timely made, for, of necessity, if a court of law possesses such jurisdiction a court of equity does not, for in Federal courts the distinction between actions at law and suits in equity, and between legal and equitable defenses is fundamental and jurisdictional. An equitable defense is not admissible in an action at law."

See, also, *O. W. R. & N. Co. v. S. P. & S. Ry. Co.*, 163 Pac., 600; 83 Or., 528.

In 2 R. C. L., 389, title "Arbitration and Award," Section 34, a distinction is drawn between awards which are absolutely void and those which will be set aside for cause shown.

"The second class consists of those cases in which the awards are valid on their face and made after proper proceedings, but the arbitrators have been guilty of fraud, misconduct, partiality, or, in some instances, of mistake. The general rule is that these extrinsic defects may not be proven in an action at law, but in equity they are proper grounds for setting aside the award."

In 5 *Corpus Juris*, title "Arbitration and Award," Section 497, page 195, it is said:

"A court of equity has jurisdiction over awards to restrain the enforcement thereof and to set them aside in the ordinary cases of fraud, corruption, and mistake, or other extraneous causes going to their validity."

The rule seems to be that awards or certificates of this character are treated like contracts, deeds, wills, or other written instruments which are effective in actions at law at their face value. If they are subject to attack at all for mistake of law or fact, fraud, or other grounds not appearing on the face of the instrument, the remedy must be by equitable action for cancellation, reformation, or injunction.

Professor Pomeroy, in his work on Equity Jurisprudence, affirms the jurisdiction in courts of equity to set aside awards, among other instruments, for mistake, fraud or other equitable grounds.

In Section 919, Volume 2, 3rd Edition, under the heading of "Equity Jurisdiction based on Fraud," the author says:

> "The jurisdiction to set aside and cancel awards was settled at a very early day, and it still exists, except so far as it has been regulated or taken away by statute."

In Volume 4 of the same edition, Section 1377, in a chapter on "Reformation and Cancellation," the author says:

> "The jurisdiction of equity to grant the remedy of cancellation exists and will always be exercised when it is necessary to protect or maintain equitable primary estates, interests, or rights; where, however, the estate, interest, or right is legal, the jurisdiction always *exists*, but its exercise depends upon the adequacy of the legal remedies—a party being left to his affirmative or defensive remedy at law, where full and complete justice can thereby be done. The occasions giving rise to the exercise of this jurisdiction are mistake, fraud, and other instances where enforcing instruments or agreements would be inequitable or un-

> just. A doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and cancelled, since the legal remedy of a party was adequate and complete, and no case was presented for equitable interference, but it is now well settled that jurisdiction will be exercised in such cases, except where the invalidity of the instrument is apparent on its face. The particular instances in which this remedy is most often given are instruments concerning land, and negotiable paper before maturity, the legal remedies in these cases being, as a general rule, inadequate. The remedy is also frequently given in case of bonds, policies of insurance, settlements and compromises, awards, and judgments."

A great many English equity cases as well as a number of American cases are cited in the footnotes to these sections, and leave no doubt of the proposition that where a defense to an award exists, not appearing on its face, the remedy is by a proceeding in equity.

Whether and when mistake of law affords a ground for attack against an award is another question. The above authorities are cited to the proposition that *assuming that a ground for attack exists*, the *proper form of remedy is in equity*. There can be no doubt under these authorities that if the guaranty certificates of the Commission are subject to attack for errors of law, an equitable action is the proper form in which to make such attack. Whether the guaranty certificates are subject to attack on the grounds set up in our petition, or whether they are impregnable against all attack in any form whatever, is another question which we shall discuss next. For the present we are

citing the above authorities merely to show that if the right to attack exists at all, an action in equity is the proper remedy. This is so thoroughly established by the above authorities that there can scarely be any controversy as to this question.

Mistake of Law is a Valid Ground for Equity Jurisdiction.

We come then to the question whether these guaranty certificates are subject to attack for errors of law, or whether they are impregnable against any attack in any form of action.

There are a great many cases holding that mistake of law is not sufficient ground for attacking an award. The rule seems to be that where the settlement of the controversy is to be determined by the sense of fairness of the arbitrators, rather than by rules of law, the award is not subject to attack for mistake of law. But where it is intended that the arbitrators are to be governed by rules of law in making their determination, it is well settled that the award may be set aside in equity for mistake of law. In 5 *Corpus Juris*, under "Arbitration and Award," Section 468, page 183, the ruling is stated as follows:

> "Whenever the arbitrators are required, by the terms of the submission or by statute or rule of court under which the arbitration proceeds, to determine the rights of the parties according to law, a plain mistake in their construction of the law is sufficient ground upon which to avoid the award The reason is that, the arbitrators having mistaken the law which they were presumed to understand, the decision is not within the scope of their authority as determined by the submission, and is therefore void.

> "*When not required to follow the law* (*aa*) GENERAL RULE. In the absence of a special requirement, the arbitrators are not bound to decide according to law, and, therefore, in such case, a mistaken construction of the law has been held not sufficient ground of avoidance of an award except it is made clearly to appear that the arbitrators intended to decide according to law, or unless it is shown that the misconstruction of law is so perverse as to work manifest injustice."

In *United States v. Farragut*, 22 Wall., 406, the court said:

> "The award was also liable, like any other award, to be set aside in the court below, for such reasons as are sufficient in other courts. For exceeding the power conferred by the submission, for manifest mistake of law, for fraud, and for all the reasons on which awards are set aside in courts of law or chancery."

In *Bridge Co. v. City of St. Louis*, 43 Fed., 768, it is said:

> "If it appears that the engineer in charge put a wrong construction on any provision of the contract, the court will correct any substantial error resulting from such mistake, for the reason that the parties did not make the decision of the engineer as to the proper interpretation of the contract, final and conclusive. It is the province of the court to construe the agreement."

The guaranty certificates, in so far as they may be subject to the rule governing awards, would seem to be analogous to those awards in which the controvery is to be determined according to rules of law, rather than according to the uncontrolled sense of fairness or judgment of

the arbitrators. If the Commission had allowed compensation for nine months instead of six months, the Government would surely have some redress, and, under the authorities above cited, the proper redress would be in a court of equity. And if such errors of law are not binding upon the Government, no more can they be binding upon the carriers. In addition to the provision that the compensation shall be for six months, there are other provisions of the statute which seem to be equally binding upon the Commission. One of them is that the compensation is to be based on the amount of Federal control rental. In the opinion of the Commission, and as a matter of fairness, the carrier might be entitled to more or less than this, but the Commission has no power to substitute its own judgment in the matter for that of Congress. The statute prescribes also that the carrier shall be allowed interest upon the cost of additions and betterments made with the approval of the President during Federal control. If it arbitrarily and deliberately substitutes its own judgment as a matter of fairness, for what the statute requires, the certificate is certainly subject to attack in some form.

If the Commission, after having made a final certificate and having thus exhausted its jurisdiction should, years after the money has been paid, attempt to execute another instrument purporting to be a final certificate for a smaller sum, and calling for a refund, it might perhaps be held that lack of jurisdiction to make the latter certificate is an objection which appears upon the face of the instrument, and that it would, therefore, be available as a defense in an action at law. But even if it be held that this one ground of attack would be available as a defense in an

action at law, the same would not be true of the other errors of law which we allege, none of which appear on the face of the instrument. The certificates themselves do not show that the Commission arbitrarily failed to include an allowance of interest upon the full cost of additions and betterments made during Federal control, nor do they show that the Commission committed the other errors of law alleged in our petition. Consequently, the remedy at law is inadequate for the presentation of all of our grounds of attack, and we must resort to equity for a complete adjudication of the controversy, if the authorities dealing with awards of arbitrators are to be followed.

Moreover it appears from the quotation from Pomeroy, *supra*, that under the later cases, equity jurisdiction will be sustained, even though the instrument may be utterly void. And this Court has sustained the equity jurisdiction in attacks on Commission orders, even where the ground of attack was unconstitutionality of the statute, and that the order was void for lack of authority.

Dayton Goose Creek Ry. Co. v. U. S., 263 U. S., 456.
I. C. C. v. D. L. & W. R. R., 216 U. S., 531.

In *I. C. C. v. Union Pacific R. R.*, 222 U. S. 541, at 547, this court, in enumerating the grounds upon which orders of the Commission might be set aside, said:

> "There has been no attempt to make an exhaustive statement of the principles involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; * * *."

This seems to recognize that an order which is a nullity can be set aside by the court upon that ground.

In *Skinner and Eddy Corp. v. United States*, 249 U. S. 557, at 562, this Court said:

> "The contention is that the Commission has exceeded its statutory powers, and that hence the order is void. In such a case, the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

In United States v. Pennsylvania R. R. Co., 242 U. S. 208, the court enjoined an order of the Commission requiring the carrier to provide and furnish oil tank cars, the sole ground being that the Commission was without statutory power to make such an order and that it was, therefore, a nullity.

In Southern Pacific Co. v. I. C. C., 219 U. S. 432, the Commission had attempted to substitute for what it admitted to be a just and reasonable rate, a lower rate based upon what the Commission conceived to be a proper business policy. On page 44, the court said:

> "Coming to the consideration of that subject, we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumptin by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

It would seem to follow from these decisions that the jurisdiction would be sustainable in the case at bar, even if our sole ground of attack were our contention that these Guaranty Certificates were nullities.

MISTAKE OF LAW IS A SUFFICIENT EQUITABLE GROUND FOR CANCELLATION OF COMMISSION ORDERS.

Whatever the rule may be as to setting aside awards of arbitrators for mistake of law, this Court has certainly settled the rule that mistake of law is sufficient equitable ground for setting aside orders of the Commission. *Interstate Commerce Commission v. Union Pacific R. R.*, 222 U. S., 541. *Inter-Mountain Rate Case*, 234 U. S., 476. *Los Angeles Switching Case*, 234 U. S., 234. *U. S. v. Pennsylvania R. R.*, 266 U. S., 191. *Southern Pacific v. I. C. C.*, 219 U. S., 433. *U. S. v. Diffenbaugh*, 222 U. S., 342. *P. & R. Ry. v. U. S.*, 240 U. S., 334. *Central R. R. v. U. S.*, 257 U. S. 247.

It is true that these cases involve rate orders. But for the purposes of equity jurisdiction, Guaranty Certificates must be put in the same class, not with other money orders, but with rate orders, because both Guaranty Certificates and rate orders are enforceable at face value if regularly made—and because, as to neither of them can mistake of law be set up as a defense in an enforcement action in a court of law. Ordinary reparation awards—that is awards of "damages" for a "violation" of some provision of the Interstate Commerce Act may perhaps be distinguished from the cases enjoining rate orders. But if so, it is not because they are orders for the payment of money, but because the statute expressly limits this kind of money orders, and this kind only, to prima facie weight, and so provides an adequate remedy at law.

The enforcement of Guaranty Certificates is not provided for under Section 16 of the Interstate Commerce Act, but is provided for by the general rules of procedure

governing the enforcement of awards of arbitrators. And these general rules of procedure provide, as to Guaranty Certificates, exactly what Section 16 provides as to rate orders, i. e., they are enforceable at face value if regularly made. Neither Section 16 of the Interstate Commerce Act, nor the common law rules which are applicable, limit Guaranty Certificates to prima facie weight, or permit a mistake of law to be pleaded as a legal defense against their enforcement.

The fact that Guaranty Certificates call for the payment of money instead of establishing future rates is immaterial. In deciding what orders are governed by the principle of the cases enjoining rate orders, the test must be, not the character of the thing ordered but the method of enforcing it. If rate orders, like money awards, were given only prima facie weight by the provisions of the enforcement statute—if mistake of law in the making of a rate order could be set up as a defense to an enforcement action in a court of law—in other words, if an adequate remedy at law existed to the same extent in the case of rate orders as in the case of money orders—then the same rules as to cancellation in equity should govern both. On the other hand, if Commission awards of money, including awards of "damages" for "violation" of the Interstate Commerce Act, were made enforceable, like rate orders, at their face value "if regularly made", then the remedy at law would be alike inadequate as to both kinds of orders; and the same rule as to cancellation in equity should govern both.

There is no logical distinction so far as the character of the orders or so far as the functions of the Commission are concerned, between an order finding that a given rate

will be unreasonable in the future and an order finding that the same rate has been unreasonable in the past, and ordering reparation. Both involve the exercise of the administrative functions of the Commission, and of its expert judgment in determining what rates are reasonable. The only distinction between them is the fact that as to this particular kind of money orders, and this kind only, Section 16 limits them to prima facie weight. What makes rate orders enjoinable, therefore, is not the fact that they are orders "other than for the payment of money" but that the fact that they are enforceable "if regularly made."

Under all of these tests, Guaranty Certificates fall within the class of orders which are enjoinable for mistake of law. The principle, established in the cases enjoining rate orders, that mistake of law is a sufficient ground of equity jurisdiction, applies just as fully to Guaranty Certificates as to rate orders.

We have been arguing the question so far as though it were conceded that in the case of reparation orders, the remedy at law is complete and that there is no jurisdiction in equity. We have pointed out that even if this be the rule as to reparation orders, it would have no application to guaranty certificates. However, it is not at all certain that this contention of the Government is sound, even as to reparation orders. This question was presented to the Commerce Court in *Southern Railway Co. v. U. S.*, 193 Fed., 664, which was an action under the Commerce Court Act to set aside an order awarding reparation. In that case the Government made the same contention that is made here, and the Court said:

"The language which defines an order which may be affected by decree of this Court is unrestricted; 'any order' which is involved in a direct suit to enjoin, set aside, annul, or suspend, provided always it is a case where a circuit court formerly possessed jurisdiction to annul, set aside, or suspend. And that prior to June 18, 1910, the circuit courts had jurisdiction is evident, for the language of Section 16 of the Interstate Commerce act, as amended by the Hepburn Act of June 29, 1906, expressly vested in such courts power to hear and determine suits to enjoin, set aside, annul, or suspend any order of the Commission. We cannot read into the clause which confers jurisdiction upon this Court words of limitation other than those which formerly circumscribed the powers of the circuit courts, nor can we except from the described kinds of cases, where injunction, annulment, or suspension may be had orders for the payment of money. The fundamental principle that Congress is presumed to have expressed its meaning with due deliberation, and that it is not within the power of the court to go beyond the plain expressions of the legislature, prevents the court from holding otherwise.

"We need go no further now than to hold that since the approval of the act creating this Court, a carrier which is ordered to pay damages and which could have gone to the circuit court in equity to have such an order annulled or enjoined, has now the right to ask this Court to enjoin or annul or suspend such an order, provided always it can show grounds for equitable relief. And as the jurisdiction of this Court over such a case is exclusive, it follows that no other court can entertain a bill in equity for the direct purposes of annulment or suspension as aforesaid."

A similar rule was adopted by the Commerce Court in *Arkansas Fertilizer Co. v. U. S.*, 193 Fed., 667.

In the former case the court indicated that the remedy of law was not entirely adequate, saying:

> "It is plain, however, that if such a defense is sustained in the circuit court, their ruling does not thereby affirmatively annul and set aside an order of the Commission; it merely determines that as between the parties before it, the order is not a valid, legal basis for the particular claim sought to be enforced."

We believe that this reasoning, and the plain and specific provisions of the statute, support these decisions of the Commerce Court, and that an action will lie to set aside an order of the Commission, even though it be a mere reparation order. It seems unnecessary to argue this question at further length, however, because, whether or not the rule will be sound as applied to ordinary reparation orders which carry only *prima facie* weight, it certainly applies to guaranty certificates which carry as much weight as future rate orders.

LACK OF JURISDICTION IN COMMERCE COURT TO ENFORCE MONEY ORDERS WILL NOT DEFEAT JURISDICTION OF DISTRICT COURT TO ENJOIN THEM.

Counsel for the Commission argues that under the Commerce Court Act the Commerce Court had no jurisdiction whatever to enforce orders for the payment of money, this jurisdiction being left in the circuit court. He then quotes, on pages 24 and 25 of his brief, from Illinois Central R. R. Co. v. U. S., 244 U. S., 81, which says that "the power of a court to stay the enforcement of an illegal order is in a sense reciprocal to its power to enforce compliance with an order of the Commission if lawful." Counsel argues from this that since the Commerce Court

could not enforce a guaranty certificate, since it is a certificate for the payment of money, therefore, it cannot enjoin one.

We believe that there are two very definite fallacies in this reasoning. The first is that the alleged order involved in the Illinois Central case was an order setting a case for hearing. It was unenforceable, not only in the Commerce Court, but in any other court. Injunction was denied, not because that particular court would have no jurisdiction to enforce such an order, but because it is not the kind of an order that would be enforceable in any court.

The second fallacy in counsel's argument lies in the fact that the Commerce Court Act expressly declares that the injunction powers of the Commerce Court are the same as the injunction powers previously exercised by the circuit court under the Hepburn Act. Therefore, if the scope of these injunction powers are reciprocal to and limited by the scope of the enforcement power of any court, the limitation must lie in the enforcement powers of the circuit court under the Hepburn Act, and not in the enforcement powers of the Commerce Court under the Commerce Court Act.

The original provisions of the Hepburn Act, in so far as they are relevant, are printed as Appendix "A" of this brief. Pertinent extracts are as follows:

> "If a carrier does not comply with an order for the payment of money * * * the complainant * * * may file in the Circuit Court of the United States * * * a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like all other civil suits for damages,

except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, * * *.

"If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, * * * any party injured thereby, or the Commission in its own name, may apply to the circuit court * * * for enforcement of such order. * * * If upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order * * *.

"The venue of suits brought in any of the circuit courts * * * to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office. * * *; and jurisdiction to hear and determine such suits is hereby vested in such courts."

It clearly appears from these provisions of the Hepburn Act that the circuit courts had jurisdiction of actions to *enforce* orders for the payment of money, as well as orders other than for the payment of money, and that on the other hand, they had jurisdiction to *enjoin* "any order or requirement" of the Commission. Therefore, under the rule in the Illinois Central case, that injunction powers are reciprocal to and coextensive with enforcement powers, the circuit court had power to enjoin orders for the payment of money. Under the Commerce Court Act, the injunctive powers of the Commerce Court are those "possessed by circuit courts of the United States and the judges thereof, immediately prior to June 18, 1910." Under

the Urgent Deficiencies Act of 1913, "the jurisdiction vested in said Commerce Court by said Act '(the Commerce Court Act)' is transferred to and vested in the several district courts of the United States." A more complete extract of the pertinent provisions of this Act is printed as Appendix "B" to this brief. It, therefore, appears that under the rule quoted from the Illinois Central case, and under the argument made by counsel for the Commission, jurisdiction to enjoin orders for the payment of money was vested in the circuit court, and the same jurisdiction has descended through the Commerce Court to the present district courts.

This same argument was presented to the Commerce Court in *Southern Railway Co. v. U. S.*, 193 Fed., 664, *supra*, and the court said:

> "We are urged to adopt the view that when Congress excepted from the kinds of cases over which the Commerce Court may exercise jurisdiction the enforcement of an order for the payment of money, it could not have intended to authorize us to annul such an order; and it is said that when the circuit court tries an action at law to enforce such an order, that court necessarily has power to deny relief, on the ground that the order is illegal and void, and that therefore there is a destruction of that clause of the act which makes the jurisdiction of this court exclusive over cases to annul any order of the Commission. The difficulty with this reasoning lies in confounding these two propositions: On the one hand, an express affirmative denial of power to this Court to try an action sounding in tort as does one to recover damage for excesses of rates collected as ordered by the Commission, wherein right of trial by jury must be preserved; and, on the other hand, an express grant to this Court of exclusive authority to hear and

decide a petition brought to annul or enjoin an order of the Commission. No suit having for its purpose the annulling of an order for the payment of money is brought in the circuit court, and none can be; the jurisdiction of this Court being exclusive in actions of that kind. The case in the circuit court is one to recover damages upon an order duly made by the Commission. True, a defense, among others available, may involve the validity of the orders upon which plaintiff bases his action; but we need not dwell upon what questions may be presented in the circuit court, for we have no jurisdiction over them. It is plain, however, that if such a defense is sustained in the circuit court, the ruling does not thereby affirmatively annul and set aside the order of the Commission; it merely determines that as between the parties before it the order is not a valid legal basis for the particular claim sought to be enforced. In actual practice, where law and equity courts are invoked, there may arise some opportunity for varying views upon the validity of an order of the Commission. Surely, though, instances of divergencies will not happen more often than they do under any system where separation of law and equity obtains, and in any event are not of such serious apprehension as to justify a construction of the statute which would subtract from the lawful authority deliberately conferred by Congress upon this Court exclusively to enjoin, set aside, annul, or suspend, in whole or in part, 'any order' of the Commission."

If the district court has no jurisdiction to set aside an order for the payment of money, then it had no jurisdiction to set aside the order referred to in *Dayton Goose Creek Railway Co. v. U. S.*, 263 U. S., 456. The Commission order involved there was an order under the recapture clause, directing the carrier to pay to the Government

one-half of its excess earnings. Counsel for the Commission argues on page 27 of his brief that this was a mere request, and not an order that would be enforceable or would entail penalties.

Exhibit B to the petition (record page 22) in that case contains the following wording, "it is ordered that * * * each and every carrier by railroad * * * shall * * * report to the Secretary of the Interstate Commerce Commission the following matters:" The order then proceeds to enumerate matters to be reported, including a statement as to whether one-half of the excess has yet been paid. It then proceeds, "if the latter amount is unpaid it should be paid by remittance * * *." It will be noted from this that the carrier is "ordered" to submit a report showing its excess, and admonished that one-half of the excess "should be paid by remittance."

Exhibit E to the petition in that case (Record, page 44) is a letter from the Commission's director to the carrier advising that its returns show a total amount due the Government of $55,433.23, and saying "you are again requested to fully comply with the *orders* (italics ours) by * * * remitting promptly to the Secretary of the Commission the remaining one-half of the excess income so preliminarily computed." Paragraph 10 of the petition (Record, page 6) alleges the foregoing letter to be a demand of the Commission.

It is only upon the theory that this was an "order" that the jurisdiction could be sustained at all, and the only effect that this particular order could have was the payment of money. If all that was involved was a mere request, it would not be subject to injunction, nor would it afford a basis for any other form of action. If coun-

sel's argument is sound, to the effect that there is always an adequate remedy at law in such cases, and that the existence of an adequate remedy at law will defeat an equitable action, it would seem that such an argument would have been as effective in the Dayton Goose Creek case as it is here.

THE REMEDY UNDER THE URGENT DEFICIENCIES ACT IS NOT LIMITED TO ORDERS MADE UNDER THE INTERSTATE COMMERCE ACT OR AMENDMENTS THERETO.

Counsel for the Commission argues that the only "orders" covered by the Commerce Court and Urgent Deficiencies Act are orders made by the Commission in pursuance of powers conferred by the Interstate Commerce Act. In support of this, on pages 15 and 16 of his brief, he quotes from *Procter & Gamble Co. v. U. S.*, 225 U. S., 282, to the effect that "the Commerce Court was intended to be but a part of the existing system for the regulation of interstate commerce."

The question involved in the Procter & Gamble case was whether, after a "negative" order of the Commission, that is after its failure to grant affirmative relief, the Commerce Court might assume the Commission's function, and itself grant affirmative administrative relief, by an order which, while in the form of an injunction, would really require the Commission to take affirmative action.

There was no question involved as to whether an order on some subject other than the regulation of commerce could be enjoined. The question was as between a mere power of *negative* injunction, which was permissible under the existing system, on the one hand, and on the other, a power of injunction involving affirmative relief, which

would have been a change in the existing system. *Both* would have involved a regulation of commerce.

When the Court said that the Commerce Court Act was not intended to change the existing system for the regulation of commerce, it was emphasizing "existing system" and not "regulation of commerce." It would have expressed the same thought if it had said that there was no intention of changing the existing system for the discharge of whatever functions might be entrusted to the Interstate Commerce Commission. There was clearly no thought of declaring that the injunctive power of the Court, over Commission orders, were limited to orders made under the Interstate Commerce Act. That question was not before the Court, and there was nothing in the Proctor and Gamble case either to suggest such a question, or to call for an answer to it.

It was just as true of the Commission itself, as it was of the Commerce Court, that it was a body organized primarily for the regulation of commerce. But this did not prevent Congress from expanding the powers of the Commission. The only limits of the Court's field of action were those imposed upon the Commission. And as the Commission's field of action was expanded, there seems to be no reason why its enlarged limits should not continue to mark the limits of the Court's functions.

That the Commerce Court Act was effective to give the Court power to enjoin orders of the Commission, other than orders made under its then existing powers, is made plain by several decisions of this Court.

Additional powers were thereafter conferred upon the Commission, such as the power to permit the issue of securities, and the power to permit the construction,

acquisition or abandonment of lines of railroad. In all of these cases it has been held that the certificate of the Commission is an "order" within the meaning of the Commerce Court and Urgent Deficiencies Act, notwithstanding the fact that it is issued under provisions which were not a part of the law when the Commerce Court Act was passed. *Venet v. Michigan Central Railroad Co.*, 271 U. S., 127; *Colorado v. U. S.*, 271 U. S., 153; *Texas v. Eastern Texas Railroad Co.*, 258 U. S., 204; *Home Furniture Co. v. U. S.*, 271 U. S., 456; *Chicago Junction Case*, 264 U. S., 258.

We have seen from the cases on awards, cited in the early part of this brief, that an equitable action would be the proper remedy for the correction of mistakes of law in certificates such as these guaranty certificates, even though the Hepburn Act, the Commerce Court Act, and the Urgent Deficiencies Act had never been passed. Aside from the the question whether the United States can be sued (which will be discussed a little later), the cause of action which we are invoking is one which would have arisen from fundamental equitable principles, even if there were no express statutes upon the subject. This being the situation, the Hepburn Act was passed in 1906, providing that this particular form of equitable action, whenever it involved orders made by the Commission, should be brought in the circuit court (now the district court).

If this cause of action had been created for the first time by the Hepburn Act, counsel's argument might have more force. But it was not. The cause of action arises from general and long-existing equitable principles. The Hepburn Act simply provided that whenever actions of

this character should involve orders of the Commission, they should be brought in a certain court in a certain way. This provision is not limited in terms to orders made under the Interstate Commerce Act, and while it is no doubt true that the Commerce Court was created to supplement the existing system of regulating commerce, it would be a far-fetched deduction to conclude that the broad term "any order or requirement" in the Hepburn Act does not mean what it says, but means instead "any order made under the Interstate Commerce Act."

Suppose, for example, that the Commission should make an order fixing rates for the transportation of United States mails by railroad. Such an order would have to be made under the Postoffice Appropriation Act of July 28, 1916 (39 Stat., 428). This act is neither an amendment to or a part of the Interstate Commerce Act, and yet, if counsel's argument is sound, an action to set aside such an order could not be brought under the terms of the Hepburn Act, even though it specifically covers "any order or requirement of the Commission."

At the time the Transportation Act was passed, the Commission was an organized body with existing rules of practice, existing methods of procedure, and an existing process for review of its orders by injunction. Knowing all this, Congress entrusted to the Commission the power to make the orders in question. One of the well-known characteristics of this body upon which the power to make these certificates was conferred was its subjection to review by injunction. We may safely assume that if Congress had intended that the setting aside of these orders for mistake of law was not to be subject to the usual form of procedure applicable to all other orders

of the Commission, it would have said so. In the absence of such an expressed exception, it must be assumed that the usual form of procedure was to apply. It first declared, in the Urgent Deficiencies Act, that all orders of the Commission should be enjoinable. It then declared, in the Transportation Act, that the amount of the guaranty should be determined by order of the Commission. There would seem to be no escape from the conclusion that the remedy under the Urgent Deficiencies Act is not confined to orders made under the Interstate Commerce Act, but is applicable to orders made under the Transportation Act or under any other act of Congress.

THE UNITED STATES HAS CONSENTED TO BE SUED.

Granting that action would lie in equity against an individual to set aside an award for mistake of law, such an action will not lie against the sovereign, unless the sovereign has consented to be sued. Counsel for the Commission argues that while the Hepburn Act, Commerce Court Act, and the Urgent Deficiencies Act are general in their terms, in so far as the injunction provisions are concerned, nevertheless, they were intended to designate a forum and to provide a form of procedure, and not to create a new cause of action. They were directed primarily to orders involving the interest of shippers and carriers, and it should not be assumed, from the mere fact that the language is general, that the Government intended to thereby waive its sovereign rights or to submit itself to be sued. This argument is somewhat difficult to sustain in view of the fact that under the Urgent Deficiencies Act, there is an express direction

that the suit shall be brought against the United States. Counsel argues, however, that this was upon the assumption that the United States was to defend as a representative of the public, and not in its sovereign capacity or as the real party in interest.

This argument might have more weight if the Government had previously preserved its immunity from suit. But it had not done so. As long ago as March 3, 1887, Congress had given the Court of Claims jurisdiction to hear and determine equity suits against the United States, founded upon a law of Congress, or upon a contract express or implied (Jud. Code, Sec. 145, 36 Stat., 1135). It has been held that the jurisdiction of the Court of Claims under this statute was limited to causes of action involving money only. United States v. Jones, 131 U. S. 1. But where the basic controversy involves money only, the jurisdiction seems to extend to all forms of equitable relief. For example, it extends to a suit against the United States for the reformation of a written contract. *District of Columbia v. Barnes*, 197 U. S. 146; *United States v. Milliken Imprinting Co.*, 202 U. S. 168; *Ackerlind v. United States*, 240 U. S. 531. Similarly, we believe that the Court of Claims would have had jurisdiction over a suit against the United States for the cancellation of a written instrument involving the payment of money only. In 1906, therefore, such actions were sustainable against individuals in the ordinary courts of equity, and against the United States, in the Court of Claims.

This was the situation when the Hepburn Act was passed declaring that jurisdiction of actions to set aside orders of the Commission was vested in the circuit courts. Later, the Urgent Deficiencies Act vested this jurisdiction

in the district courts and provided that the action should be brought against the United States. It seems futile to argue, therefore, that an action to set aside these particular orders can not be brought in the district court, when the Urgent Deficiencies Act expressly declares that actions to set aside any order of the Commission shall be brought against the United States in the District Court. Congress then submitted the amount of the guaranty to determination by Commission order, having previously declared that Commission orders may be enjoined by suit against the United States. Its consent to be sued therefore seems very clear.

If counsel's argument is sound, then a rate order of the Commission in which the United States is interested as a shipper could not be set aside in the district court. This is clearly going too far. Even if the Court of Claims Act had never been passed, the Urgent Deficiencies Act of 1913 is clearly broad enough to cover a Commission rate order, even though the United States were the complaining party before the Commission. The Urgent Deficiencies Act applies to *any* order of the Commission, and directs that the suit be brought against the United States. It would be a most strange construction to urge that the Act does not mean what it plainly says, merely because the United States, itself, happens to have a substantial interest in the controversy.

If Counsel's argument is sound, then the case of *Dayton Goose Creek Railway v. U. S.*, 263 U. S., 456 should not have been brought in the district court, because that involved a controversy which was wholly between the carrier on one side and the United States, as the substantial party in interest on the other. That case involved an

order for the payment of the excess earnings by the carrier to the Government, under the recapture provisions of the Interstate Commerce Act. And while the injunction was refused, the jurisdiction of the District Court to consider the case upon its merits was sustained.

CONCLUSION.

We submit that any instrument, signed by the Commission, and creating a cause of action, or definitely affecting the legal status of the parties is an "order." We submit that, so far as equitable jurisdiction is concerned, orders of the Commission can be divided into not more than two classes: (1) those which have only *prima facie* weight and as to which an edequate remedy at law is provided and (2) all others. So far as equity jurisdiction is concerned, it is not sound to classify them as between orders for the payment of money and other orders. Whether they are made under the Interstate Commerce Act, Post Office Appropriation Act, the Transportation Act, the Safety Appliance Act, the Boiler Inspection Act, or any other statute, is not a sound basis of classification. Nor is it sound to classify them according to whether the United States has a substantial interest.

Orders coming under class (1), that is, those that have only *prima facie* weight, and as to which the defense at law is provided, may or may not be subject to cancellation in equity. We believe that they are and the Commerce Court has so held. However this may be, orders under class (2), which have more than *prima facie* weight, are subject to cancellation in equity, whether they are for the payment of money or otherwise, whether they arise under the Interstate Commerce Act or some other act,

and whether the United States has a substantial interest or is merely representing the public. Under the terms of the Urgent Deficiences Act, the district courts have jurisdiction of such actions, and they must be brought against the United States.

We submit that the judgment of dismissal rendered in the court below should be reversed and the case remanded to the District Court, with instructions to consider the alleged errors of law upon their merits.

The Merits.

While the motion to dismiss has the effect of a demurrer to the bill, and might have been granted upon the ground that, even if the court had jurisdiction, the petition does not state facts sufficient to constitute a cause of action, the lower court did not in fact give any consideration to the latter question, and we assume that this court will not care to consider it here for the first time. We have, therefore, discussed the case upon the merits very briefly, and only in our original brief.

We would like to add here, however, a comment upon *Northern Pacific Ry. Co. v. Interstate Commerce Commission*, 23 Fed. (2nd) 221, in which the District Court of Appeals held, in a case brought by the Northern Pacific Railway Company, that a certificate for partial payment under section 212 of the Transportation Act, was not conclusive and that the Commission had jurisdiction later to make a final certificate for a smaller amount. The reason stated by the Court is that, in the nature of things, the Commission could not be certain that any part of the Guaranty was due until it was certain of the whole. This

is clearly fallacious. It is obvious that where the total items claimed, aggregate 17 or 18 million dollars, it might be entirely possible that the Commission will feel certain as to twelve and one-half million dollars and doubtful as to five or six million. This is exactly how it felt in our case. Of course, it is possible that, in finding that a part of the items at least are certainly due, the Commission may be mistaken. It is equally true that it may be mistaken in making its final certificate. Both parties assume the chance of that. But this does not alter the fact that it is just as possible for the Commission to reach a certain conclusion as to some items, while remaining doubtful as to others, as it is to finally reach a certain conclusion as to all items. It seems, therefore, that the reasoning of the District Court of Appeals is not sound.

Since filing our original brief, we have examined the debates in the House of Representatives upon the Winslow Bill, which was H. R. 15836, and which was subsequently enacted as Section 212 of the Transportation Act. These debates make it certain beyond the possibility of a doubt that the construction which we place upon Section 212 is exactly the construction that Congress intended. We have added an Appendix "C" to this brief containing extracts from the debate as it appears in the Congressional Record. It appears from these extracts that opponents of the Bill repeatedly pointed out that it would give to the Commission's Certificates of partial payment up to the amount of partial payment certified, a finality and conclusiveness equal to that of a final certificate under Section 209 (g), and that the Commission would have

no power, later, to make a final certificate for a smaller amount or to recover the excess. In reply, the supporters of the bill repeatedly pointed out that this was exactly the effect intended. They insisted that when Section 209 (g) was originally enacted, Congress had intended that that paragraph itself should have this very effect. It provides that the Commission may certify, not a single amount, but the "several amounts" necessary to make good the guaranty and that the Secretary of the Treasury might draw, not a single warrant, but "warrants." The Commission had construed section 209 (g) in this same way, and had issued definite certificates for partial payment accordingly. However, the Comptroller of the Treasury had ruled that Section 209 (g) authorized only one final payment, and refused to honor a certificate for a partial payment drawn under this section. The District Court of Appeals of the District of Columbia refused a writ of mandamus to compel the Secretary of the Treasury to issue such a partial warrant, and it was for the purpose of meeting this situation that the Winslow Bill was introduced. The report of the Committee on Interstate Commerce to the house, on H. R. 15836, states that the purpose of the Bill is to authorize the Interstate Commerce Commission to certify partial payments to carriers under Sections 204 and 209 of the Transportation Act of 1920, the Comptroller of the Treasury having ruled that such sections authorized only one final payment.

The supporters of the Winslow Bill repeatedly asserted in debate that there was no more danger of a mistake in a partial certificate, than there was in a final certificate; that the Commission could be trusted to make a partial certificate definitely and correctly, as fully as it could be

trusted to make a final certificate; and that there was no reason why the possibility of an excess payment should be considered or provided for.

During the course of the debate, Representative Barkley offered the following amendments to be inserted at the end of paragraph A, Section 212: "before making such payment or drawing such warrant, unless it be on a final settlement, the Secretary of the Treasury shall require the carrier to execute a contract on such security as the Secretary of the Treasury may determine, providing that upon final determination of the amount of the guaranty under sections 204 and 209, such a carrier will repay to the United States any amounts which it may receive from such partial payment in excess of the guaranty, with interest at the rate of 6% per annum from the time such excess was paid."

After a lengthy debate, the above amendment was voted down by a vote of 115 to 65.

There was no similar debate in the Senate, but the above debate in the House and the proposed amendment, were reported in the Congressional Record before action was taken upon the Bill by the Senate.

We can see no ambiguity in the terms of the Bill itself, but if there is any, this debate, and the rejection of the proposed amendment, seem to make the intention of Congress clear beyond any possibility of a doubt.

In addition to the several decisions cited in our original brief indicating that no board or tribunal which has once made an award for a definite amount can later make an award for a different amount covering the same items, we should like to add two decisions in the District of Columbia, holding that when a statute confers jurisdic-

tion upon the District Commissioners to make a certain finding, and they do in fact make a finding as authorized, their authority is exhausted and they cannot thereafter change their findings. *Rudolph et al v. Timothy Brosnam*, 41 Wash. Law Rep., 755; *McFarland v. P., B. & W. R. Co.*, 37 Wash. Law Rep., 129.

These decisions would seem to be authority for our contention that the Commission's certificate of $12,500,000, dated March 1, 1921, was final up to that amount, and could not thereafter be reduced.

Respectfully submitted,

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APPENDIX A.

EXTRACTS FROM HEPBURN ACT (34 Stat., 584).

"SEC. 16. That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such an order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.
* * *

"In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be

joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment, in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff. * * *

"It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect. * * *

"If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same,

the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus. * * *

"The venue of suits brought in any of the Circuit Courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts."

APPENDIX B.

EXTRACTS FROM URGENT DEFICIENCIES ACT OF 1913 (38 STAT., 208).

The Commerce Court, created and established by the act entitled "An Act to Create a Commerce Court and to amend the act entitled 'An Act to Regulate Commerce,' approved February 4, 1887, as heretofore amended, and for other purposes," approved June 18, 1910, is abolished from and after December 31, 1913, and the jurisdiction vested in said Commerce Court by said act is transferred to and vested in the several district courts of the United States, and all acts or parts of acts in so far as they relate to the establishment of the Commerce Court are repealed.

* * *

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall

be construed as meaning final destination of such shipments.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. * * * The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within 30 days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of

any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within 60 days after the entry of such final judgment or decree, and such appeal may be taken in like manner as appeals are taken under exsting law in equity cases.

APPENDIX C.

EXTRACTS FROM CONGRESSIONAL RECORD, VOL. 60, PART 3, CONTAINING DEBATE IN HOUSE OF REPRESENTATIVES ON H. R. 15836 (SECTION 212, TRANSPORTATION ACT 1920) IN WHICH REPRESENTATIVES OPPOSING THE BILL POINTED OUT THAT IT WOULD HAVE THE EFFECT OF MAKING PARTIAL CERTIFICATES CONCLUSIVE, WITHOUT THE POSSIBILITY OF REFUND IN THE EVENT OF ERROR, AND IN WHICH SUPPORTERS OF THE BILL POINTED OUT IN REPLY THAT IT WAS THE INTENTION TO MAKE THE PARTIAL CERTIFICATES JUST AS BINDING PRO TANTO AS A FINAL CERTIFICATE.

Mr. Barkley said, page 2737:

"This Bill no where protects the United States Government. Under sub-section (h) of Section 209, which authorized the Secretary of the Treasury to pay out advancements as recommended by the Interstate Commerce Commission during the six months Guaranty Period, it was provided that before these advancements should be made by the Secretary of the Treasury, he should have the power to require the railroads involved to give bond that if the Government under the advancement paid more than was due the road would pay back the excess with interest at the rate of 6%."

Mr. Cooper said, page 2738:

"The Interstate Commerce Commission in its last annual report recommends legislation of this character. I quote from page thirty of this report in which the Commission says:

'The immediate payment to some of these carriers of the amounts or parts of amounts which we can now de-

termine to be certainly due them under the Guaranty provisions of the Transportation Act, 1920, is vital to their meeting operating expenses, fixed charges, and other obligations which they must meet in order to properly serve the public as common carriers'."

Mr. Sims said, page 2739:

"This bill provides no protection to the Government in case of excess payments on certificates. It provides that the Interstate Commerce Commission certificates must be paid in full and no return whatever to the Government is provided for such excessive payment. * * * Why did you a few months ago think that the public deserved the protection of a contract with security to return excess in advances and now provide that no return of the excess on the certificates for payment of guaranty is to be secured, as was required for excess advances during the Guaranty Period?"

On page 2740, appears the following:

Mr. Montague. I understand from the gentlman's position that the bill does not enlarge or diminish the existing guaranty, but simply enables the Government to make several payments instead of one payment in settlement of such Guaranty?

Mr. Winslow. Stated with absolute accuracy.

Mr. Griffin of New York said, page 2801:

"I call the attention of the committee particularly to what in my opinion is serious oversight, and that is the failure to provide against errors creeping into the estimates upon which the partial payments are made. * * * For instance if you were building a house and enter into an agreement with the builder to pay him certain partial payments as the work progresses, what would you think

of a lawyer who would draw the contract so as to compel you to make partial payments until the aggregate total was paid to the builder before the accounts between you were finally adjusted and determined. * * * I have an amendment to propose which will safeguard the Government to the modest extent of 10%, and I suggest that in these partial payments paid to the railroads, we ought to reserve at least 10% holdback until the accounts between the Government and the companies are finally adjusted."

Mr. Merritt, page 2802, said:

"I ask your careful attention to the terms of the certificate which the Interstate Commerce Commission gives for these partial payments. It is this:

'The Commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of ..... is necessary to make good to said carrier the guaranty provided by section 209 of the Transportation Act of 1920.

The Commission hereby certifies that such amount of ..... cannot be reduced by further accounting or otherwise, and there might be upon further investigation additional amounts found due said railroad company * * *.'

So the Interstate Commerce Commission certifies that there cannot be an amount less than they certified. Therefore, there is no risk; there is no sense in asking for any bond, any more than there is for asking for bonds on payments of any other judgments, and there is no sense in taking security for any part of the partial payments."

The following occurs on page 2802:

Mr. Montague. As I understand it, there is no bond required if there were only one final payment.

Mr. Merrit. None.

Mr. Montague. And you simply ask that the same rule apply here?

Mr. Merrit. Certainly.

Mr. Barkley said, page 2803:

"I think that when the railroad with the certificate of the Interstate Commerce Commission goes to the Secretary of the Treasury and asks for a partial payment on an account, that is as yet undetermined, the Secretary of the Treasury ought to be authorized to require a bond that if in the final settlement it turns out that the partial payments amount to more than the road was entitled to, or would be entitled to under final payment, the road should pay back to the Government the excess with interest from the date of payment * * *."

The following appears on page 2803:

Mr. Hardy (of Texas). Does not subsection (b) foreclose the Government in any error forever thereafter?

Mr. Barkley. That is my understanding.

Mr. Esch said, page 2807:

"Mr. Chairman, paragraph (g) of Section 209 contains the paragraph which authorizes the making of partial payment to the roads. I want to read it in order to show the justification for the making of such payments:

'The Commission shall, as soon as practicable, after the expiration of the Guaranty Period, ascertain and certify to the Secretary of the Treasury the several amounts'—using the plural—'necessary to make good the foregoing guaranty to each carrier.'

These several amounts are necessary to make good the foregoing guaranty to each carrier. The natural implication would be that there would be more than one warrant for each carrier. It goes on and says further:

'The Secretary of the Treasury is authorized and directed thereupon to draw warrants'—in the plural—'in favor of each such carrier upon the Treasurer of the United States.'

The strong inference is that the language of the Transportation Act justified the Interstate Commerce Commission in certifying for partial payments. And the Commission was surprised when the Comptroller of the Treasury handed down a decision to the effect that one final settlement must be made, with only one certificate. Surely, we who had helped to frame this bill, when we framed this sub-section, understood and believed that the right of making a certificate for partial payment was unquestioned, but the Commission making a like interpretation followed that practice and issued more than one certificate. Be that as it may, we are trying now to clarify that section * * *."

On page 2808, Mr. Montague said:

"What does the Interstate Commerce Commission say?"

Mr. Clark, the Chairman of that Commission may be quoted * * *.

"We never conceived that there was any question of our power to certify an amount certainly due to a carrier under paragraph (g) of Section 209, even though it was not final and complete certificate, until the Secretary of the Treasury declined to recognize certificates of that nature which we would issue * * *.

Now if I am correct in that, then this bill simply carried into the law what was thought by most competent authority to have already been contained in it * * *."

On pages 2808 and 2809, the following appears:

Mr. Hastings: The point I was getting at was if it was thought necessary at that time to protect the Government by a bond given for advancements during the period of Guaranty, why was it not put into this bill?

Mr. Montague: I do not understand that the bill states it correctly that these are advancements; they are payments on account of money due and no bond will be required.

Mr. Barkley: If the gentleman will permit, the law required that for advancements during the six months period, they were required to give bond for repayment of any excess.

Mr. Montague: The gentleman is correct but that does not pertain to the final account.

Mr. Barkley: Oh, no.

Mr. Montague: And if we are not required to give it on a final account, why should we on a partial account?

Mr. Dempsey said, page 2809:

"Now, the gentleman from Tennessee (Mr. Sims) makes two objections. First, he assumes that the Interstate Commerce Commission is to make some fatal error and he wants to defer that judgment. Is the question to be referred to some other body? Is it to be referred to the Supreme Court? Why, if it is to be determined anyway, in the end by the Interstate Commerce Commission—you have the same Commission, you have the same facts, and is the gentleman assuming that on the same state of facts, the same body will give an erroneous judgment at one time and a correct judgment at another * * *".

The following appears on page 2809:

"Mr. Reavis: * * * If we pay more under the estimate than we owe and have agreed to what has the Interstate Commerce Commission to do with it?

Mr. Dempsey: Why, the Interstate Commerce Commission issue a certificate upon the facts, and its decision is made upon all of the data obtainable.

Mr. Reavis: But if we pay more than is due?

Mr. Dempsey: We are just as likely to be right now as at any time in the future."

On page 2812 appears the following:

"Mr. Barkley: Mr. Chairman, I offer an amendment. * * * At the end of line one, page 2, insert: 'Before making such payment or drawing such warrant, unless it be upon a final settlement, the Secretary of the Treasury shall require the carrier to execute a contract on such security as the Secretary of the Treasury may determine, that upon final determination of the amount of the guaranty under sections 204 and 209, such carrier will repay to the United States any amounts which it has received from such partial payment in excess of the guaranty with interest at the rate of 6% per annum from the time such excess was paid."

Mr. Barkley: Mr. Chairman, this amendment carries out the provision which the Transportation Act carries in subsection (h) of Section 209, which authorizes the Commission to certify advancements to the Secretary of the Treasury where it is necessary to pay fixed charges and operating expenses.

Mr. Winslow said, page 2812:

"Under the provisions of the Transportation Act, the amount arrived at and which could be put forward as an advance was the estimated amount, and for that reason of estimate, in order to protect the Government, the conditions of the bond or security to cover are provided in the law.

Now, in this instance, we have another situation. Whatever amounts will be paid under the Bill before us will rest upon amounts which have been carefully canvassed, and which have been worked out to the satisfaction both of the debits and credits. There is a very different situation indeed."

Mr. Barkley said, page 2813:

"But suppose it turns out afterwards that there is a mistake, and suppose that the railroad has put something over the Interstate Commerce Commission in arriving at the estimate. Then under the language of this bill that estimate which has been arrived at must be final settlement as to that item, and the Government has no recourse to offset that claim against another claim that may be adjusted in the future. Therefore, I think it is very important to require that the railroads shall be required to give bond so that if they are overpaid the excess shall be returned to the Government * * * but if it should be determined that the railroad had been paid less than it was estimated it should be paid, I think the Government would be under obligation to pay it. I doubt seriously if these debits and credits ought to be binding either upon the railroad or government except when the railroad makes its final settlement.

Mr. Denison: Then, there would be no compromise, and the railroads and the government would have to wait until the final settlement was determined. The purpose of this bill is to encourage early settlements.

Mr. Barkley: This bill will not encourage early settlements. If you strike out the language making it final as against both railroads and government, you will leave them free to offset these claims against each other. But of you leave the language like it is, you have this situation; every road will insist upon settling each one of these items at a time, and when one of them has been settled, the Government is bound by that settlement.

Mr. Denison, page 2813, said:

"The Interstate Commerce Commission is the tribunal which we have entrusted with the authority to make these final settlements, and if we can depend upon them to protect the interests of the Treasury in making final settlements, it seems to me we can very well do so in making partial settlements.

Mr. Barkley: But the Interstate Commerce Commission is liable to make mistakes as well as anybody else, and these accounts will be audited by individuals in the Interstate Commerce Commission. Does the gentleman think that the Government should be protected if it should occur that a mistake was made?

Mr. Denison: We have got to reach settlements some time. I was informed this morning that the accounting department of the Interstate Commerce Commission is the finest accounting institution of its kind in the United States if not in the world, and if we cannot depend upon it to safeguard the interests of the Treasury in making these settlements, then we ought to endeavor to provide some tribunal upon whom we can depend.

On page 2814, is the following:

Mr. Cooper: Mr. Chairman, the amendment which the gentleman from Kentucky (Mr. Barkley) offers was thoroughly discussed by the Committee during the consideration of this bill. I want to read you what Mr. Robinson, representative of the short line roads, said relative to this question:

"If a law should be enacted requiring the short lines and weak roads to guaranty repayment to the government in case of a mistake by the Government itself, it would be a very serious burden * * *."

Mr. Bee: Does not the gentleman think that if the Government of the United States should pay in excess of what they owe the railroads, the government of the United States ought to have the right to institute the necessary proceedings to recover from the railroads the amount improperly paid, and in that event would not the government of the United States be entitled to judgment and execution to collect the amount?

Mr. Cooper: The gentleman from Ohio is agreed and is entirely willing to let the Interstate Commerce Commission make a settlement of these payments for our Government. They are the authority that has the power to negotiate questions of this kind. I am not afraid that the Interstate Commerce Commission will permit any overpayments on these partial payments which the railroads are now asking.

On page 2815, the following appears:

"The question was taken; and on a division (demanded by Mr. Barkley) there were—ayes 65, noes 115.

Mr. Griffin said, page 2818:

"And I note that in the talks upon this measure today men with tears in their eyes emphasized the fact that it is only a question of how much money we owe the railroads, that it is due them, and that you are playing fair when inserting the proviso "definitely ascertained." Of course, after the amount is definitely ascertained, there is nothing to do but to pay it. That ought to satisfy any skeptic. That qualification is found in the first paragraph which states:

"In making certificates under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Co., may make its certificate for any amount definitely ascertained by it to be due."

Now, my amendment proposes that you put yourselves in the place of the Government and reserve 10% to safeguard the Treasury of the United States against possible error, fraud, deceit, or mistake. * * *.

The question was taken, and the amendment was rejected.

As the Winslow Bill was introduced, paragraph (b) provided that the Commission's "reasonable estimate" of the net effect of deferred debits and credit items, when agreed to by the carrier could be used as a dfinitely ascertained amount and that such estimate so agreed to "shall be binding in final settlement." Mr. Dewalt offered an amendment striking out the word "binding" in the last line and inserting the words "prima facie but not conclusive evidence of their correctness in amount." This amendment was debated on pages 2815 and 2816 and was

adopted by a vote of 116 ayes, and 95 noes. Thus Congress drew a distinction between deferred debit and credit items mentioned in paragraph (b) which in the nature of things could not be definitely ascertained, and all other items, covered by paragraph (a), which could be definitely ascertained. The deferred debits and credits were made "prima facie but not conclusive" while the definite ascertainment of all other items, under paragraph (a), were left conclusive and binding.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 612

GREAT NORTHERN RAILWAY COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES

OPINIONS

The opinion of the specially constituted District Court (Circuit Judge Kenyon and District Judges Sanborn and Molyneaux) is reported as *Great Northern Railway* v. *United States,* 22 F. (2d) 865 (R. 110).

The Commission's report appears as *Guaranty Settlement with Great Northern Railway,* 111 I. C. C. 318 (R. 81).

JURISDICTION

The final decree dismissing petition was entered October 1, 1927 (R. 107); and reentered as amended October 20, 1927. (R. 110.) The appeal was allowed on October 21, 1917 (R. 112), under Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219), and Section 238 of the Judicial Code, as amended February 13, 1925 (c. 229, 43 Stat. 938; U. S. C. Title 28, Sec. 47). (R. 2.)

QUESTION

By Section 209 of the Transportation Act of 1920 (not part of Interstate Commerce Act) the United States guarantees to railroads a certain railway operating income for the period of six months immediately following Federal Control on a basis substantially the same as that which they had received during Federal Control. The Interstate Commerce Commission was directed to ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the guaranty.

The Commission had issued four certificates aggregating $12,500,000 which Great Northern had been paid. On June 8, 1926, the Commission issued its amended certificate (which cancelled a previous certificate) (R. 106; Exhibit C, R. 24), and which recited that final determination had been made and certified the amount necessary to make good to Great Northern as $11,170,214.02. That certificate showed that an overpayment had been previously made to Great Northern of $1,329,785.98.

In order to prevent deductions from compensation earned for the carriage of the mail, Great Northern entered into written agreement (R. 26) with the United States under which it deposited Liberty Bonds aggregating $1,625,000 with the Comptroller General to be held by him pending the final determination of the claim in an action against the United States (R. 26).

The question is, Whether the amended certificate of June 8, 1926, is an *order* within the meaning of Urgent Deficiencies Act and the specially constituted District Court has jurisdiction to cancel it; *to enjoin the use of the certificate for any purpose whatever by the United States or any official thereof* and *to enjoin the United States* from disposing of any of the Liberty Bonds and from refusing to return them to Great Northern. (R. 21.)

STATUTES

Appendix A. Commerce Court Act (c. 309, 36 Stat. 539) and Urgent Deficiencies Act (c. 32, 38 Stat. 219; U. S. C. Title 28, sections 43, 46, 47).

Appendix B. Section 209 of the Transportation Act of 1920 (c. 91, 41 Stat. 464; U. S. C. Title 49, section 77) and amendment of February 26, 1921 (c. 72, 41 Stat. 1145; U. S. C. Title 49, section 79).

STATEMENT

Alleging facts of which the Court takes judicial notice, e. g., on December 31, 1917, the President took possession and assumed control of the rail-

roads and operated them under the Federal Control Act of March 21, 1918, until they were relinquished on March 1, 1920 (R. 2), Great Northern further alleges that on December 30, 1918, it entered into a contract with the Director General for annual compensation under Section 1 of the Federal Control Act, and prior to March 15, 1920 filed with the Commission a written statement that it accepted all the provisions of Section 209 (R. 2).

Great Northern further alleges that on October 18, 1920, the Commission ordered all carriers which had accepted the provisions of Section 209 to file with the Commission true and correct returns to a questionnaire and form of claim accompanying the order which were to be the basis for settlements under Section 209, and on February 11, 1921, Great Northern filed its verified return showing $14,333,-340.54 was one-half of its standard return, and therefore one-half of the annual compensation fixed by its contract under the Federal Control Act, and the amount of increase in such compensation provided for in Section 4 of the Act was $509,217.46. The return further showed Great Northern had an operating deficit during the guaranty period amounting to $3,655,833.67, so the total amount claimed, without the deduction for advances theretofore made, was the sum of $18,498,391.67, making amount due after deduction of advances $11,998,-391.67. (R. 4, 5.)

Great Northern alleges that during the guaranty period it made application to the Commission for

advances which were necessary to enable it to meet fixed charges and operating expenses, and the Commission certified to the Secretary of the Treasury three separate amounts aggregating $6,500,000, which were not "in excess of the *estimated* amount necessary to make good to petitioner the guaranty provided for in Section 209." (R. 3.)

Great Northern further alleges that before receiving any of the payments mentioned it executed, on June 30, 1920, a contract with the Secretary of the Treasury to the effect that upon final determination of the amount of the guaranty, it would repay to the United States any amounts received by it from such *advances* in excess of the guaranty, with interest at 6 per cent per annum from the time such *excess* was paid, and the Secretary of the Treasury directed the Great Northern to secure performance of the contract by executing and delivering to him its promissory notes for the amounts and by pledging as security for payment to the United States and the performance of the contract Liberty Bonds in the amount of $1,625,000. The contract provided that in the event of default of repayment by Great Northern of any sum due thereunder, the Secretary should have the right to sell and dispose of the Liberty Bonds; and if, "upon the final determination by the Commission of the amount of guaranty due," it should be found that the *advances* received were less than or did not exceed the amount of the guaranty, the Secretary would release the bonds. (R. 3, 4.)

From the Commission report (111 I. C. C. 319; R. 83) it appears that the advance payments were based upon sworn statements submitted by the carriers and upon other available data such as annual and monthly reports on file with the Commission. In view of the necessities of the carriers and the urgency of their requests for further payments the Commission recommended to Congress such legislation as would meet the situation, and in response thereto Congress enacted Section 212, which provided for partial payments. Apparently until Section 212 was enacted, further payments had been suspended; for on March 1, 1921 (only three days after Section 212 was approved) and with $6,500,000 already in their possession, Great Northern applied for further advances and the Commission certified and the Secretary of the Treasury paid the further sum of $6,000,000. That brought the total to the $12,500,000. (R. 5.)

In its report the Commission says (111 I. C. C. 321; R. 85):

> The making of the certifications for partial payments before field check could be made of the sworn data submitted by the carriers, and prior to the final determination of the principles governing the guaranty payments, led to overpayments to 35 carriers. Of these, 28 have reached final settlement, 22 have refunded the overpayment or promised to do so, and 6, including the carrier, have neither repaid nor promised to repay.

Great Northern further alleges that on December 15, 1921, the Commission fixed December 31, 1921, as the date on which all accounts pertaining to the guaranty period should be closed for the purpose of computing the guaranty and the Great Northern was allowed until June 15, 1922, to file final statement of amount due. On June 15, 1922, Great Northern filed a statement claiming as the total amount of its guaranty the sum of $17,599,756.42 and as the balance remaining due, after deducting advances, the sum of $5,099,756.42. (R. 5.) Subsequently, in conference with the Commission's representatives these figures were reduced to $17,421,650.35 and $4,921,650.35. Great Northern had protested that the certificate of March 1, 1921, definitely ascertaining that the sum of $6,000,000 was due to Great Northern was a final determination of the *minimum* amount due to the extent of the sum so ascertained, and the Commission was without jurisdiction to consider any reduction or any question at all other than what additional sum should be certified over $12,500,000. (R. 6.)

Great Northern further alleges that on June 17, 1925, the Commission wrongfully and unlawfully determined the total amount due was $11,178,887.31 and there was due to the United States under Section 209 (g) a refund of $1,321,112.69; and the Commission wrongfully and unlawfully issued its certificate, reciting Great Northern was indebted to the United States in that amount; that the Commis-

sion delivered the certificate to the Secretary of the Treasury and *he thereupon demanded of petitioner that it refund and pay to the United States* the amount; that the Commission wrongfully and without any jurisdiction or authority sought to modify its definite ascertainment under Section 212 and to reduce the amount which it had definitely ascertained and to require a large part thereof to be paid back. (R. 6, 7.)

Great Northern appears never to have been certain of its claim. On March 26, 1921, Great Northern submitted a revision of its return computed entirely in accordance with the Railway Executives' formula showing $18,645,653.32 as the amount necessary to make good its guaranty. Great Northern later filed a return, designated as final, in which it claimed $17,599,756.42. On July 2, 1925, it stated in a brief that $15,705,688 was approximately correct and the amount found due should be "at least $15,000,000" (R. 84), although it prayed in the same brief that the Commission issue a certificate "declaring that no refund is due from the carrier and that there still remains due to the carrier under the guaranty such additional amounts as the Commission may determine," thus indicating a minimum claim of $12,500,000, the amount already paid, plus as much more as might be considered reasonable and just (R. 84).

On June 17, 1925, the Commission issued a report (99 I. C. C. 231) and certificate (R. 23)

certifying an overpayment of $1,321,112.69. Subsequently the claim was reargued before the full Commission. On June 8, 1926, the Commission issued the second report and amended certificate (111 I. C. C. 318; R. 81; R. 106) by which it cancelled the certificate of June 17, 1925, and certified the total amount due as $11,170,214.02. The amended certificate was delivered to the Secretary of the Treasury.

Alleging that the amended certificate issued to the Secretary of the Treasury by the Interstate Commerce Commission under Section 209 (g) of the Transportation Act of 1920, certifying that $11,170,214.02 is the amount necessary to make good the guaranty provided by Section 209, and that a previous certificate certifying an overpayment of $1,321,112.69, dated June 17, 1925, constitute orders of the Interstate Commerce Commission, Great Northern Railway brought the suit "to enjoin, set aside, annul, and suspend" the amended certificate. (R. 1.)

Attached to the petition is a copy of an agreement dated September 20, 1926 (R. 26), which recites the United States asserted a claim of $1,329,785.98, with interest, and the Comptroller General deemed it to be his duty to withhold from Great Northern payments due from the United States for transportation of mail, freight, and passengers. The United States and Great Northern agreed the latter should deposit $1,625,000 in Government

securities with the Comptroller General, who shall deposit them with the Treasurer of the United States for safekeeping, as security for the refund of the overpayment, the Comptroller General to continue payments for the transportation. (R. 26, 27.)

The agreement recites that an action against the United States to test the validity of its claim for overpayment is contemplated and the Government securities are to be held by the Comptroller General pending the final determination of the claim; if the determination is in favor of the United States and the claim is not otherwise paid, the securities shall be sold and the proceeds applied on account of the amount so determined; if the final determination shall be in favor of Great Northern the securities shall be delivered back to it. (R. 27.)

The agreement recites the claim shall be deemed to have been finally determined when it shall have been decided by the court of last resort having jurisdiction, and a certified copy of the decree of court making the final determination shall be deemed to be satisfactory evidence thereof. (R. 28.)

Seizing upon the two certificates as "orders" of the Commission on which to hang a suit in equity, Great Northern alleges it is advised by its counsel (R. 21) that it could not have attacked the order collaterally "but that an action in the nature of this proceeding now brought would have been necessary to *cancel* the said order of the Commission and to avoid such counterclaim." The prayer for relief is that the United States "be restrained and en-

joined from disposing of any of said Liberty Bonds, and from withholding from petitioner the said Liberty Bonds and the interest coupons thereon, and any thereof; and that defendant be restrained and enjoined from withholding any payments due from the United States to petitioner and from asserting the said certificate of the Commission as an offset against any such indebtedness, and that the use of said order or certificate for any purpose whatever by the United States, or any official thereof, be perpetually enjoined." (R. 21.)

Pursuant to Equity Rule 29, the United States incorporated in its answer (R. 75), as in *Pennsylvania Railroad* v. *Railroad Labor Board,* 261 U. S. 72, 73; *United States* v. *Los Angeles & Salt Lake Railroad,* 273 U. S. 299; *United States* v. *Kansas City Southern Railway,* 275 U. S. 00, its separate defenses, including motions to dismiss for want of jurisdiction which may be thus summarized: first, the certificates issued by the Commission to the Secretary of the Treasury are not "orders" within the meaning of Urgent Deficiencies Act; second, the United States has not consented to be sued in the District Court in this manner in this transaction; third, the Commission is the sole authority to ascertain and certify the guaranty and its action in so far as it is challenged in this proceeding is final.

There was also a motion to dismiss for insufficiency of fact to state a cause of action in equity but that motion was not heard.

After argument on the questions of jurisdiction, without further hearing the District Court took the case under advisement. In its order of October 1, 1927 (R. 107), all three motions to dismiss for want of jurisdiction were sustained. Subsequently, October 20, 1927 (R. 110), the Court filed its amended order in which it eliminated the third ground, viz, "that in this proceeding the certificates of the Interstate Commerce Commission must be taken as final and conclusive (R. 109)."

SUMMARY OF ARGUMENT

The amended certificate and the agreement neither separately nor together constitute "any order" of the Interstate Commerce Commission within the meaning of the Urgent Deficiencies Act over which the specially constituted District Court may exercise jurisdiction; but the suit obviously is designed to cancel or to suppress the certificate and to enjoin the Secretary of the Treasury and the Comptroller General from carrying out the terms of the agreement which was voluntarily entered into by the Great Northern for its own protection.

The United States has not consented to be sued in this manner, as obviously the whole transaction relates to an adjustment of compensation which is not a subject within the equitable jurisdiction under the Urgent Deficiencies Act.

Great Northern and United States are the direct parties in interest in the settlement as between themselves. The transaction does not arise

out of the Interstate Commerce Act in which the public interest is involved but out of Section 209 of the Transportation Act of 1920 which was designed to liquidate the World War; and the emergencies for invoking the jurisdiction under Urgent Deficiencies Act are wholly lacking.

The hearing in the District Court, the decree and the three assignments of error were all limited to the questions of jurisdiction only; and in the absence of rulings of the District Court and appropriate assignments of error counsel for Great Northern should not be heard here on the merits.

ARGUMENT

I

THE AMENDED CERTIFICATE ISSUED BY THE COMMISSION TO THE SECRETARY OF THE TREASURY IS NOT AN "ORDER"

There is no statutory line running from the specially constituted District Court to the Commission by which a decree of cancellation of the certificate may be sent; nor is there such a line running from that court to the Secretary of the Treasury and/or the Comptroller General over which an injunction decree may be sent.

Although Great Northern is named therein, the certificate of overpayment runs from the Commission to the Secretary of the Treasury who has made demand for the refund; but it can not successfully be maintained the demand is an *order* of the Commission and the basis for an injunction decree.

Finally, the voluntary agreement of September 20, 1926, between Great Northern and United States, is not an *order* of the Commission. (R. 26.)

Great Northern alleges it is "advised by its counsel that it could not have attacked said order collaterally" (R. 21) and yet it alleges that the certificate is absolutely null and void as beyond the power and authority of the Commission to issue. These allegations are self-destructive (*Illinois Central* v. *Public Utilities Commission,* 245 U. S. 493).

The much-worn argument that "*any* order" is justicable under the Commerce Court Act which provides for jurisidiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part 'any order' of the Commission" because the words "any order" mean any action whatsoever taken by the Commission, has been repeatedly rejected. Thus the words "any order" do not include an order of the Commission which dismissed a complaint, *Proctor & Gamble* v. *United States,* 225 U. S. 282; or an order denying an application by a railroad company to continue the operation and stock ownership of a steamship line under the Panama Canal Act (c. 390, 37 Stat. 560, 566), *Lehigh Valley Railroad* v. *United States,* 243 U. S. 412, affirming 234 Fed. Rep. 682; or an order fixing the date of a hearing on a complaint pending before the Commission, *United States* v. *Illinois Central Railroad,* 244 U. S. 82; or an order declaring the tentative valuation of the property of a railroad

company, *Delaware & Hudson* v. *United States,* 266 U. S. 438, or an order reopening a tentative valuation of railway property for further hearing, *New York, Ontario & Western* v. *United States,* 273 U. S. 652.

In *United States* v. *Los Angeles & Salt Lake Railroad,* 273 U. S. 299, 309, 314, the suit was commenced in the District Court for the Southern District of California to annul and enjoin the use for any purpose of the final valuation of the company's properties in any proceeding. On the authority of the *Delaware & Hudson case* the District Court took jurisdiction (4 F. (2d) 736), and later annulled the valuation and permanently enjoined its use (8 F. (2d) 747). In reversing the decree, this Court said:

> The final report on value, like the tentative report, is called an order. But there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act. See *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412; *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82, 89; *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438. For the first nineteen years of the Commission's existence no order was so reviewable. The statutory jurisdiction to enjoin and set aside an order was granted in

1906, because then, for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable. Hepburn Act, June 29, 1906, c. 3591, §§ 2–7, 34 Stat. 584, 586–595. The first suit to set aside an order was brought soon after. *Stickney* v. *Interstate Commerce Commission,* 164 Fed. 638; 215 U. S. 98. The jurisdiction conferred by the Hepburn Act was transferred, substantially unchanged, to the Commerce Court, by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539; and, when that court was abolished, to the district courts, by the Urgent Deficiencies Act. The so-called order here assailed differs essentially from all those held by this Court to be subject to judicial review under any of those Acts. Each of the orders so reviewed was an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and rule making.

The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions

reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later. It was merely preparation for possible action in some proceeding which may be instituted in the future—preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action shall arise. The final report may, of course, become a basis for action by the Commission, as it may become a basis for action by Congress or by the legislature or an administrative board of a State. But so may any report of an investigation, whether made by a committee of Congress or by the Commission pursuant to a resolution of Congress or of either branch thereof.

* * * * *

Little need be added concerning the further contention that the suit should be entertained under the general equity power of the court. Two arguments are urged in support of the proposition. One is that since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public. The other is that the Commission may

itself be misled into illegal action by the erroneous conclusions and may apply them to the carriers' injury, since use of the final valuation is required in making rates pursuant to § 15a of the Act to Regulate Commerce, as amended by Transportation Act, c. 91, § 421, 41 Stat. 456; in prescribing divisions of joint rates under § 15; in determining the limit upon the amount of capitalization, in the event of a consolidation under § 5; in determining the propriety of an issue of securities, under § 20a; or as the basis of computation of the amount of excess earnings to be recaptured under § 15a. Neither argument is persuasive. The first reminds of the effort made in *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board,* 261 U. S. 72, to suppress the report of that board. The second reminds of the attempt to secure a declaratory judgment in *Liberty Warehouse Co.* v. *Grannis, ante,* p. 70; and, also, of cases in which it was sought to enjoin a municipality from passing an illegal ordinance. Compare *New Orleans Waterworks Co.* v. *New Orleans,* 164 U. S. 471, 481; *McChord* v. *Louisville & N. Ry. Co.,* 183 U. S. 483.

Obviously the petition on its face is not one to enjoin an order of the Commission. The suit is designed to cancel the certificate and to enjoin the Secretary of the Treasury and the Comptroller General from carrying out the terms of the agreement which was entered into by Great Northern for its own benefit. If the amended certificate was not an order when it was issued, the subsequent action

of the Comptroller General and the agreement with respect thereto did not convert it into an order.

Without an order of the Commission the suit may not be maintained against the United States. Even with an order of the Commission the suit may not be maintained against the Secretary of the Treasury and the Comptroller General. There is no affirmative order of the Commission which may result in any irreparable injury or damage in case the order is finally held invalid. It is not pretended that such a situation exists here. One of the arguments advanced in the *Los Angles & Salt Lake case* was that the Commission's valuation was an "outstanding menace."

Even if the amended certificate is an outstanding evidence of indebtedness, equity proceedings will not lie for its cancellation and suppression. *United States* v. *Los Angeles & Salt Lake Railroad, supra.*

Great Northern counsel in their brief quote from the foregoing language of the Court in the *Los Angeles & Salt Lake Case* and argue that the amended certificate assumes the character of evidence. They do not pretend that any penalty attaches for its nonobservance but they say "Plainly the certificate now before us does purport to determine rights and obligations," and its effect is "to create a cause of action in favor of the Government." (Br. 33, 34.) The amended certificate is not even directed to the Great Northern. Knowl-

edge or notice of the certificate comes to it through a demand made by the Secretary of the Treasury. Even if the order is evidence in a suit against the Great Northern, it would seem that it would be time enough to assail its validity when the certificate is brought forward in the suit. Suits may not be brought before the specially constituted District Court under Urgent Deficiencies Act to suppress evidence or a cause of action. *Meeker* v. *Lehigh Valley,* 236 U. S. 412, 430; *Mills* v. *Lehigh Valley,* 238 U. S. 473, 482; *Spiller* v. *Atchison, Topeka & Santa Fe,* 253 U. S. 117, 131, 132; *St. Louis Southwestern* v. *Commission,* 264 U. S. 64, 77; *Pittsburgh & West Virginia Railway* v. *United States,* 6 F. (2d) 646, 648, 649; *United States* v. *Los Angeles & Salt Lake Railroad, supra.*

II

THE UNITED STATES HAS NOT CONSENTED TO BE SUED IN THIS MANNER IN THIS TRANSACTION

In the instant case Great Northern and the United States are the direct parties in interest. The United States made the guaranty on certain terms and conditions pursuant to which Great Northern received from the United States money of the United States. The latter claims an overpayment which the Great Northern disputes. Notwithstanding it deposited Liberty Bonds as security, Great Northern has brought the injunction suit to prevent interference by the United States in its endeavor to recover the money. The transaction is between the Great Northern and the United

States exclusively. Consent that the United States may be sued in such a transaction in the specially-constituted District Court is not found in the Urgent Deficiencies Act and does not exist. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 382, 387; *Oregon* v. *Hitchcock,* 202 U. S. 60, 68; *Illinois Central Railroad* v. *Public Utilities Commission,* 245 U. S. 493. The decree of the court would be no more than merely advisory as in *Liberty Warehouse Company* v. *Grannis,* 273 U. S. 70; *New Jersey* v. *Sargent,* 269 U. S. 328; *Fairchild* v. *Hughes,* 258 U. S. 126; *Massachusetts* v. *Mellon,* 262 U. S. 447; *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162.

In a suit to set aside an order of the Commission under Urgent Deficiencies Act the United States is made by a statute a necessary party and this means that it is to stand in judgment as representing the public. *Illinois Central Railroad* v. *Public Utilities Commission,* 245 U. S. 493, 505. In this case the United States is sued in a money transaction with which Great Northern alone is concerned.

The petition prays the Court to render ineffective an agreement voluntarily entered into and to enjoin the United States from carrying out the terms of the same without designating or indicating any officer or officers of the United States or any person or persons acting or refusing to act for and on behalf of the United States against whom such an injunction may issue. The suit is unique.

III

THE MERITS OF THE CASE ARE NOT HERE

Notwithstanding by the amended decree the District Court limited its order of dismissal to jurisdiction only (R. 107, 110), counsel for Great Northern, in addition to the jurisdictional questions, have argued at great length the merits of the case and conclude (Br. 68): "We do not ask that this Court find as a fact the amount necessary to make good the guaranty. We simply ask the Court to state the correct rules of law, and, if it determines that the Commission has erred as a matter of law, to enjoin the erroneous certificate."

They say they do this because of the undetermined motion to dismiss for insufficiency of fact (R. 77) which it is now incumbent upon them to oppose (Br. 47).

The only three assignments of error relate to questions of jurisdiction only. Obviously there could not be other assignments of error as no other rulings were made. The merits, therefore, were neither determined by the District Court nor are they here on this appeal by appropriate assignments of error.

CONCLUSION

The decree of the District Court was correct and should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

APRIL, 1928.

APPENDIX A

THE COMMERCE COURT ACT (C. 309, 36 STAT. 539)

That a court of the United States is hereby created which shall be known as the commerce court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

First. * * *.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. * * *.

Fourth. * * *.

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this act shall not affect the jurisdiction now possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes.

URGENT DEFICIENCIES ACT (C. 32, 38 STAT. 219; U. S. C. TITLE 28, SECS. 43, 46, 47)

The Commerce Court, * * * and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed * * *.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. * * *

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. * * * No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance

to hear and determine the application two other judges * * *. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. * * *; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

APPENDIX B

TRANSPORTATION ACT OF 1920 (C. 91, 41 STAT. 464; U. S. C. TITLE 49, SEC. 77)

Guaranty to Carriers after Termination of Federal Control

SEC. 209. (a) When used in this section—

* * *

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and * * *

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to

the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in section 4 of the Federal Control Act.

(2) With respect to any carrier entitled to just compensation under the Federal Control Act, with which such a contract has not been made, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half of the annual amount estimated by the President as just compensation for such carrier under the Federal Control Act, including the increases in such compensation provided for in section 4 of the Federal Control Act. If any such carrier does not accept the President's estimate respecting its just compensation, and if in proceedings under section 3 of the Federal Control Act it is determined that a larger or smaller annual amount is due as just compensation, the guaranty under this paragraph shall be increased or decreased accordingly. * * *

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

AMENDMENT OF FEBRUARY 26, 1921 [1] (C. 72, 41 STAT. 1145; U. S. C. TITLE 49, SEC. 79)

SEC. 212. (a) In making certifications under section 204 or section 209, the Commission, if not at

[1] The 35th Annual Report of the Commission to Congress, 1921, page 22, contains an account of the status of the adjustments of the six months' guaranty after termination of Federal Control.

Representative Esch, from the Committee of Conference of the two Houses, on February 18, 1920, submitted Confer-

the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway

---

ence Report No. 650 to the House of Representatives, which contained the following provisions (p. 58): "Advances.—The House Bill made provision for advances to the carrier during the guaranty period, not in excess of the estimated amount of guaranty, to enable it to meet its fixed charges and operating expenses, upon execution of properly secured contracts for repayment of any overpayments. The Senate Bill contained no such provision, which the Conference Bill retains." House Reports, Vol. 1, 66th Cong., 2nd Sess., 1919–1920.) See also Report No. 456 of Committee on Interstate and Foreign Commerce, House of Representatives, November 10, 1919, page 13 (House Reports, Vol. 2, 66th Cong., 1st Sess., 1919), and Report No. 1243, Committee on Interstate and Foreign Commerce, January 26, 1921, on the purpose of the bill which authorized the Commission to certify partial payments to carriers under Sections 204 and 209. (House Reports, Vol. 1, 66th Cong., 3d Sess., 1920–1921.)

Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.

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Office Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

No. 612

In the Supreme Court of the United States

OCTOBER TERM, 1927

GREAT NORTHERN RAILWAY COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

BRIEF FOR INTERSTATE COMMERCE COMMISSION

DANIEL W. KNOWLTON,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

APRIL 12, 1928.

U. S. GOVERNMENT PRINTING OFFICE: 1928

SUBJECT INDEX

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I. THE GOVERNMENT'S CONSENT TO BE SUED IN RESPECT OF THE AMOUNT OF ITS GUARANTY CAN NOT BE FOUND IN THE DISTRICT COURT'S SPECIAL JURISDICTION UNDER THE URGENT DEFICIENCIES ACT 11

1. That special jurisdiction, created as an amendment to the Interstate Commerce Act, was intended solely for review of orders relating to commerce regulation directed to carriers subject to the regulatory authority, and was never intended to afford review of a certificate directed, not to the carriers subject to regulatory authority, but to the Secretary of the Treasury, and relating, not to matters of commerce regulation, but to a governmental guaranty significantly excluded by the Act of its creation, Transportation Act, 1920, from those portions of that Act that were named amendments to the Interstate Commerce Act 13

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2. While the Urgent Deficiencies Act authorizes suits in name against the Government in respect of matters of commerce regulation, that authority can not be consistently or harmoniously enlarged to embrace suits involving the public money, which are suits, in substance as well as name, against the Government and, where authorized at all, are provided for before a special tribunal, or by jurisdiction conferred upon the district courts limiting the monetary amount of the claim----- 1

3. The court's jurisdiction under the Urgent Deficiencies Act to enjoin orders of the Commission bears a reciprocal relationship to its jurisdiction to enforce such orders, and the Commission's certificate, directed to the Secretary of the Treasury rather than to the carriers and being, moreover, for the payment of money, clearly falls outside the enforcement side of the court's special jurisdiction over regulatory orders and therefore should be reciprocally excluded from the enjoining side of that jurisdiction-- 2

4. The fact that the guaranty section is in substance a gratuity, and the fact that its terms, agreed to by the carriers, clothe the Commission with broad discretion in the premises without provision for appeal from its determination, rebut any possible implication that the Government intended that the Urgent Deficiencies Act should constitute its consent to be sued in respect of the amount of its gift---------- 2

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 612

GREAT NORTHERN RAILWAY COMPANY, APPELLANT
v.
THE UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINION OF THE COURT BELOW

The opinion of the court below is reported in 22 F. (2d) 865.

STATEMENT OF THE CASE

This is an appeal under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219), from an order of the District Court for the District of Minnesota, consisting of Circuit Judge William S. Kenyon and District Judges John B. Sanborn and Joseph A. Molyneaux, sitting pursuant to said Urgent Deficiencies Act, which order dismissed for

want of jurisdiction, a petition of the appellant steam railroad for a permanent injunction to set aside, annul and suspend a certificate issued by the Interstate Commerce Commission, certifying the amount due to appellant under section 209 of the Transportation Act, 1920, commonly known as the guaranty section, and to enjoin the United States from disposing of certain liberty bonds held pursuant to a certain contract, from withholding said bonds and interest coupons thereon from the appellant, from withholding any payments due the appellant and from asserting and using the certificate of the Commission as an offset to such indebtedness or for any purpose whatever.

EVENTS LEADING UP TO THE SUIT

By Presidential Proclamation of December 26, 1917, issued under authority of the Army Appropriation Act of August 29, 1916, and by virtue of all other powers thereto enabling, substantially all railroads of the country were taken under Federal control. Compensation for their use was provided for by the Federal Control Act of March 21, 1918, and was based, generally speaking, upon the railroads' average net railway operating income during a test period prior to the war, namely, the three years ended June 30, 1917, which sum, commonly known as standard return, was to be ascertained and certified to by the Interstate Commerce Commission for use in agreements between the President and the carriers. If the carrier should be dis-

satisfied with the standard return it could, under the Act, submit the question of compensation to a board of referees with privilege of appeal from their determination to the Court of Claims.

On December 30, 1918, the Director General of Railroads, acting for the President, entered into an agreement with the petitioner, Great Northern Railway, which was in its general terms, the standard form of contract adopted by the Railroad Administration for general use. (R. 39.) The aggregate annual compensation to be paid the railroad was named in the contract but was made subject to any corrections in computations, or in line with accounting regulations, that might thereafter be certified by the Commission. The appellant expressly accepted the rights arising out of the contract in full settlement for compensation under the Constitution and laws of the United States and for any loss or damage that might result from the taking, use, control, and operation of its properties. (R. 46–47.)

By the Transportation Act, 1920, the railroads of the country were on March 1, 1920, relinquished to their owners. Although all constitutional and legal obligations on account of the taking and use of the railroads had already been taken care of, as above set forth, that Act in line with the Government's generous policy toward the railroads, contains two grants, the one, section 204, granting to railroads that had been relinquished prior to the termination

of general Federal control and had subsequently sustained deficits during the control period a continuance for the control period subsequent to their relinquishment of the compensation paid them while actually used by the Government, the other, section 209, in substance guaranteeing the railroads which were under Federal control at the termination thereof a continuance of such compensation for the six months following their relinquishment to private management. The gratuity provisions of section 204 are of interest in this case only to the extent that the court decisions thereunder are applicable to analogous circumstances arising under section 209. The provisions of section 209 are directly involved in this case.

By section 209 the United States guaranteed to any carrier filing written acceptance of the terms thereof on or before March 15, 1920, a net railway operating income for the six months following Federal control (March 1 to August 31, 1920) equal to one-half its federal control compensation. Such carrier in turn agreed to pay to the United States any sums earned in excess of the guaranty. The commission was designated to ascertain and certify to the Secretary of the Treasury the amount due under the guaranty, and, as a necessary corollary thereto, to determine the proper allowances in maintenance expenditures and other operating expenses in arriving at the amount by which the net income in fact earned during the guaranty period was less than the guaranteed net income. Recog-

nizing the difficulties of early ascertainment of the whole amount due and the urgent needs of the carriers, subdivision (h) of section 209 authorized the Secretary of the Treasury to make advances, during the guaranty period, of amounts certified to by the Commission as necessary to meet a particular railroad's fixed charges and operating expenses, but not in excess of the estimated amount necessary to make good its guaranty. In compliance with this paragraph the Commission issued its certificate for such advances to many railroads during the guaranty period, such certificates necessarily being based in large measure on the unchecked returns and estimates of the carriers, since the guaranty period was not then ended. Following the guaranty period the Commission found that the early ascertainment of the amounts due the carriers under the guaranty was a practical impossibility. Because of deferred debits and credits the accounts for the six-month guaranty period could not be definitely closed Moreover, the amounts charged by the carriers to operating expense during the guaranty period could not be accepted without examination for the reason that the act imposed upon the Commission the duty of scrutinizing such charges and, in the case of amounts charged to maintenance and depreciation of property, required it to adjust the same to the basis of the test period charges, making proper allowance for changes in the price of labor and materials and for

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differences in amount and use of property involved. In recognition of the difficulties confronting the Commission in making final determinations of amounts due, and, indeed, upon recommendation of the Commission, Congress by amendment of February 26, 1921, added Section 212 to the Transportation Act, 1920, whereby the Commission was authorized, if not at the time able to ascertain the whole amount due, to certify to the Secretary of the Treasury partial payments in amounts definitely ascertained to be due.

During the guaranty period the Secretary of the Treasury made advances, under subdivision (h) of section 209, of $6,500,000 to appellant, based upon the Commission's certificate, and received from it a contract secured by $1,675,000, face value of liberty bonds, to reimburse the government if such advances should prove to exceed the guaranty. Following the guaranty period the Secretary of the Treasury made partial payments under section 212 in the further sum of $6,000,000, based upon the Commission's certificate that that amount in addition to sums theretofore certified was definitely due the appellant. (R. 22.) Final adjustment of the appellant's accounts disclosed that these advance payments were in excess of the total amount due it under the guaranty, and the Commission, thereupon, issued its certificate of June 17, 1925, certifying that the whole amount due (including amounts of $75,698.89 and $31,418.88 due, respectively, to

two certain subsidiaries of appellant (R. 6)) was $11,178,887.31 and that the amount due the United States on account of overpayment was $1,321,-112.69. (R. 23–24.) 99 I. C. C. 231. On petition of appellant the proceeding was reopened for argument and further consideration before the entire Commission. The Commission's final report found that items amounting to $98,444.48 credited to income during the guaranty period properly belonged to the earlier operations under the Director General. 111 I. C. C. 318. This decreased the net railway operating income of the guaranty period and increased to the same extent the amount due the carrier under section 209, which increase was taken into consideration in the Commission's certificate of June 8, 1926, whereby the aggregate amount due appellant and its said subsidiaries was certified as $11,277,331.79 and the amount due appellant alone $11,170,214.02. This certificate cancelled the earlier certificate of June 17, 1925, and further, although setting forth the advance payments that had been certified aggregating an amount in excess of the whole amount found due, it did not in terms certify that any sum was due the United States, for the reason presumably that the Commission's authority under the Act is only to certify to the Secretary of the Treasury the amounts due from the United States to the carriers. (R. 24–26.)

The Secretary of the Treasury, upon receipt of the certificate, requested reimbursement of the

overpayment. Following the appellant's refusal to comply the Comptroller General withheld mail pay accruing to the carrier and finally a contract was entered into with the Comptroller General, secured by deposit of liberty bonds, whereby appellant agreed to make good the overpayment if the government's right thereto was sustained by court of last resort. (R. 26–30.)

PROCEEDINGS IN THE LOWER COURT

This suit was then instituted against the United States whereby the lower court was asked to set aside the Commission's certificate of final ascertainment of the whole amount due under the guaranty, to enjoin the United States from disposing of said liberty bonds and from withholding any payments due petitioner, and to enjoin the United States or any official thereof from asserting or using said certificate as an offset against such indebtedness, or for any purpose whatsoever. (R. 1.) The United States filed its answer and motion to dismiss for lack of jurisdiction in the court. (R. 75.) The Interstate Commerce Commission intervened and filed answer and likewise moved to dismiss for lack of jurisdiction in the court. (R. 30, 108.) The court, consisting of the 3 judges above named, convened and sitting pursuant to the Urgent Deficiencies Act of October 22, 1913, ordered that the question of jurisdiction be first argued and determined, and, after oral argument, fixed the time within which briefs should be filed on that question.

Briefs were filed and on October 1, 1927, the court entered its order dismissing the petition for lack of jurisdiction on the grounds "(1) that the certificates are not orders which can be enjoined or annulled under the provisions of the acts giving this court jurisdiction to review orders of the Interstate Commerce Commission; (2) that Congress has not consented that the United States be sued in this court in this proceeding." (R. 107–112.)

APPELLANT'S CONTENTIONS

The appellant's contentions are in substance:

That the Commission's certificate under section 209 of the Transportation Act, 1920, is an "order" within the meaning of the Commerce Court Act and the Urgent Deficiencies Act and that those Acts constitute the Government's consent to be sued in this case.

Appellant also contends that the Commission's certificate was erroneous as a matter of law. This goes to the merits but is justified by appellant on the ground that one of the motions for the defense challenges the sufficiency of the facts alleged in the petition. Nevertheless the sole question heard by the lower court was as to whether it had jurisdiction in respect of the Commission's certificate. (R. 110.) It dismissed the petition for lack of jurisdiction (R. 112) and accordingly this contention of appellant is not relevant to the issues raised by the appeal.

ARGUMENT

SUMMARY

I. The Government's consent to be sued in respect of the amount of its guaranty can not be found in the district court's special jurisdiction under the Urgent Deficiencies Act.

1. That special jurisdiction, created as an amendment to the Interstate Commerce Act, was intended solely for review of orders relating to commerce regulation directed to carriers subject to the regulatory authority, and was never intended to afford review of a certificate directed, not to the carriers subject to regulatory authority, but to the Secretary of the Treasury, and relating, not to matters of commerce regulation, but to a governmental guaranty significantly excluded by the Act of its creation, Transportation Act, 1920, from those portions of that Act that were named amendments to the Interstate Commerce Act.

2. While the Urgent Deficiencies Act authorizes suits in name against the Government in respect of matters of commerce regulation, that authority can not be consistently or harmoniously enlarged to embrace suits involving the public money, which are suits, in substance as well as name, against the Government, and, where authorized at all, are provided for before a special tribunal, or by jurisdiction conferred upon the district courts limiting the monetary amount of the claim.

3. The court's jurisdiction under the Urgent Deficiencies Act to enjoin orders of the Commission

bears a reciprocal relationship to its jurisdiction to enforce such orders, and the Commission's certificate, directed to the Secretary of the Treasury rather than to the carriers and being, moreover, for the payment of money, clearly falls outside the enforcement side of the court's special jurisdiction over regulatory orders and therefore should be reciprocally excluded from the enjoining side of that jurisdiction.

4. The fact that the guaranty section is in substance a gratuity and the fact that its terms, agreed to by the carriers, clothe the Commission with broad discretion in the premises without provision for appeal from its determination rebut any possible implication that the Government intended that the Urgent Deficiencies Act should constitute its consent to be sued in respect of the amount of its gift.

II. The Government's consent to this suit can not be found in any other legislation providing for suits against the United States in the district courts.

I

THE GOVERNMENT'S CONSENT TO BE SUED IN RESPECT OF THE AMOUNT OF ITS GUARANTY CAN NOT BE FOUND IN THE DISTRICT COURT'S SPECIAL JURISDICTION UNDER THE URGENT DEFICIENCIES ACT

It follows from the fundmental rule that the Government may not be sued without its consent that the only permissible suits against the United States are such as have been expressly consented to. The Government has consented to be sued in the Court

of Claims in respect of certain matters, including claims founded upon acts of Congress (except pension Acts) and upon contracts, express or implied. It has consented to be sued in the district courts in respect of similar matters except where the claim involved exceeds $10,000. It has consented to be sued in other special instances, for example, in suits in the district courts to set aside orders of the Interstate Commerce Commission entered in performance of its duties under the Act to Regulate Commerce, as amended. Urgent Deficiencies Act (38 Stat. 219). Mention should also be made of that class of cases against officials or agencies of the Government which are held not to be suits against the Government, although the official or agency committing the wrong assumes to act on behalf of the Government. These latter cases are not relevant here since this suit is, both in substance and name, one against the United States (see cases cited in *Ex Parte Young,* 209 U. S. 123, 150, 151) and purports to be brought under the Urgent Deficiencies Act.

1. That special jurisdiction, created as an amendment to the Interstate Commerce Act, was intended solely for review of orders relating to commerce regulation directed to carriers subject to the regulatory authority, and was never intended to afford review of a certificate directed, not to the carriers subject to regulatory authority, but to the Secretary of the Treasury, and relating, not to matters of commerce regulation, but to a governmental guaranty significantly excluded by the Act of its creation, Transportation Act, 1920, from those portions of that Act that were named amendments to the Interstate Commerce Act.

It is true, as urged by appellant, that the court's special jurisdiction under the Urgent Deficiencies Act to enjoin orders of the Commission includes not only mandatory orders but permissive orders as well; that is to say, orders permitting acts by the carriers which require the Commission's precedent authority. It is true that under court decisions such orders may take the form of certificates if the substance thereof constitutes such Commission action as was intended by Congress to be subject to review. It is further true that the recent *Los Angeles Valuation Case,* 273 U. S. 299, indicates that one of the criterions of a reviewable order is as to whether or not the particular commission action is determinative of rights or obligations. But the *Los Angeles case* and all other decisions of the Supreme Court, passing upon what orders are enjoinable under the Urgent Deficiencies Act, have dealt with orders relating to commerce regu-

lation issued under the Act to Regulate Commerce and directed to carriers subject to the regulatory authority. The certificate here involved was issued pursuant to special legislation constituting no part of the Act to Regulate Commerce, and was directed not to the carriers subject to the regulatory authority, but to the Secretary of the Treasury. The Commission's recognition of the fact that its certificate could not properly be directed to or against the carriers is shown by the fact that, while its first certificate of the whole amount due also certifies that the overpayment shown was due from the carrier to the United States, its last certificate, cancelling that earlier certificate, corrects its earlier action in this particular and merely discloses that the overpayment existed without certifying that the amount was in fact due from the carrier. The Court's special jurisdiction under the Urgent Deficiencies Act was intended only as a part of the existing system for the regulation of interstate commerce under the Act to Regulate Commerce and can not be extended to afford review of Commission action as special arbiter of the amount of a governmental gift or guaranty enacted by special legislation constituting no part of the Act to Regulate Commerce.

The history of the court's special jurisdiction is outlined in *Proctor & Gamble Co.* v. *U. S.*, 225 U. S. 282, and in the *Los Angeles Valuation Case,* 273 U. S. 299. It is shown in those cases that the Commerce Court Act of 1910 created the commerce

court and conferred upon it jurisdiction to set aside, as well as to enforce orders of the Commission issued under the Act to Regulate Commerce, and that subsequently the Urgent Deficiencies Act abolished the commerce court and transferred its jurisdiction to the district courts. As showing that the court's special jurisdiction was created as an amendment to, and is confined to orders issued under the Act to Regulate Commerce, the following is quoted from the opinion in the *Proctor & Gamble Case,* pages 294–295:

> * * * It cannot be disputed that the act creating the Commerce Court was intended to be but a part of the existing system for the regulation of interstate commerce, which was established by virtue of the original adoption in 1887 of the act to regulate commerce, and which was expanded by the repeated amendments of that act which followed, developed in practical execution by the rulings of the body (Interstate Commerce Commission), upon whom was cast the administrative enforcement of the act, the whole eluciated and sanctioned by a long line of decisions of this court. That in adopting the provisions concerning the Commerce Court and making it part of the system, it was not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient by affording a more harmonious means for securing the judicial enforcement of the act to regulate commerce is certain. The act creating the Commerce Court (June 18, 1910, 36 Stat. 539,

> c. 309) was entitled "An Act to create a Commerce Court, and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes." The first six sections, which called into being the Commerce Court and definied its powers, all demonstrate the purpose as above stated, that is, to adjust the powers and duties of the newly created court in such manner as to cause them to accord with the system of regulation provided by the act to regulate commerce as it then existed.

In view of the fact that the court's special jurisdiction was created as an amendment to the Act to Regulate Commerce (now officially cited as the Interstate Commerce Act, 41 Stat. 499) and as part of the existing system of commerce regulation, it is important to determine what relation the guaranty legislation, section 209, Transportation Act, bears to the Interstate Commerce Act. Title IV of the Transportation Act sets forth in detail the amendments and changes made to the Interstate Commerce Act under the heading "Amendments to Interstate Commerce Act" (41 Stat. 474). Section 209 is not included but is found under Title II headed "Termination of Federal Control" (41 Stat. 457), and the reason is not far to seek.

Section 209 guarantees to any carrier accepting its terms a net railway operating income for the six months following federal control, equal to one-half its annual federal control compensation as named in

its contract with the Director General, and the duty of scrutinizing the carriers accounts is placed with the Commission. Clearly these temporary duties in determining the net amount due under a grant of public monies to individual carriers are not related to its important and continuing duties to the general public in regulating rates and service. Because of its experience in railroad accounting the Commission was selected for the task just as other officials of the Government are frequently designated to administer special legislation apart from their regular duties. For example, special duties are imposed on the Secretary of the Interior under the "Retirement of Federal Employees Act" and special duties are imposed upon the Secretary of Commerce under the "Radio Commission Act." The Commission's fitness for the task imposed upon it very obviously does not necessarily constitute that task a part of its duties in regulating commerce. It is true, as suggested by appellant, that since the enactment of the Commerce Court Act the Commission's duties have been greatly enlarged, but, in so far as those duties pertain to commerce regulation, the enlargement has been a natural development. Each new duty added by amendment to the Interstate Commerce Act has been a logical outgrowth of duties theretofore exercised. The duty of ascertaining the amount due under a governmental gratuity or guaranty was not commerce regulation and was not therefore made, by amendment, a part of the Act to Regulate Commerce.

2. While the Urgent Deficiencies Act authorizes suits in name against the Government in respect of matters of commerce regulation, that authority can not be consistently or harmoniously enlarged to embrace suits involving the public money, which are suits in substance as well as name, against the Government and, where authorized at all, are provided for before a special tribunal, or by jurisdiction conferred upon the district courts limiting the monetary amount of the claim.

It has been shown that the Transportation Act, while designating certain of its provisions as amendments to the Interstate Commerce Act, excludes section 209 from that designation, presumably for the reason that the section pertains to a guaranty of public money and not to matters of commerce regulation. On these grounds alone it may be asserted with conviction that the special jurisdiction of the court, created in the manner above shown as an amendment to the Interstate Commerce Act and for the purpose of reviewing orders issued thereunder, are not here applicable. Furthermore, a construction permitting the review under the special code provisions of a governmental guaranty would not only be out of place in a system set up solely for commerce regulation, but likewise would not be in harmony with the general scheme of jurisdiction in respect of suits against the Government. This is shown in the *Procter & Gamble Case,* wherein the court says, at pages 299–300:

> * * * A. The first section of the act wherein is recited the jurisdiction of the Commerce Court which we have previously commented upon makes clear that the purpose was not to create a court with new and strange powers destructive of the previous well-established administrative authority of the Interstate Commerce Commission and *in conflict with the general jurisdiction vested in the courts of the United States*, but only to give to the new court the special jurisdiction then possessed by the courts of the United States for the enforcement of orders made by the Commission, and thus to unify the exertion of judicial power with reference to the enforcement of the orders of the Commission. The opening words of the section which makes this result clear are as follows: It (the Commerce Court) shall "have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds: * * *". (Italics ours.)

Prior to the Commerce Court Act suits involving Commission orders were brought against the Commission as defendant. *Hepburn Act, 1906,* 34 Stat. 592. They were, presumably, of that class of cases against officials or agencies of the government which are held not to be suits in substance against the sovereign, although the official or agency committing the wrong assumes to act on behalf of the government. *Ex Parte Young,* 209 U. S. 123. Obvi-

ously, therefore, the jurisdiction, transferred from the Circuit Courts to the Commerce Court, and from the latter subsequently transferred to the District Courts, was in respect of suits not in substance against the United States, and the provision in the Commerce Court Act that suits of such nature should be brought against the United States did not alter the fundamental nature of the suit but constituted merely the consent of the United States to be sued in name in respect of the Acts of its agent, the Commission, in performing its regulatory duties under the Interstate Commerce Act. The provision was never intended to constitute consent to a suit such as this, involving the gratuitous or contractual monetary rights or obligations of the government under the statutory guaranty and its indebtedness for carriage of the mails and seeking to restrain or control the acts of its officials taken or to be taken in the interest and for the protection of the public treasury, for suits of such nature are in substance as well as name suits against the sovereign. *Belknap* v. *Schild,* 161 U. S. 10, 18–19, 25 and cases cited; *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601; *Goldberg* v. *Daniels,* 231 U. S. 218.

As will be later more fully shown section 209 of the Transportation Act constitutes in reality a mere gratuity or gift, in respect whereof it seems doubtful that the Government has, by any legisla-

tion, consented to be sued. If it should be considered that the carrier's acceptance of the terms of the section has effected a legally binding contract with the Government, then its remedy, if any there be other than that before the Commission, which is denied, is at law before a special tribunal provided for the purpose (Judicial Code, Section 145) or, within certain monetary limits, under the general jurisdiction of the District Courts (Judicial Code, section 24 (20); *Belknap* v. *Schild, supra,* 17), for although appellant is now withholding, and by this suit attempting to safeguard, an overpayment made to it by the Government, nevertheless its claim is in essence a monetary claim against the United States. To argue that the Commerce Court Act and the Urgent Deficiencies Act were intended to constitute consent to suits against the United States, which would confuse such a claim and likewise claims for carriage of the mails with equity suits arising under the Interstate Commerce Act is to argue that it was intended to set up a special jurisdiction "in conflict with the general jurisdiction vested in the courts of the United States."

Appellant argues that the public money might, because of the Government's capacity as a shipper or traveller, be involved in the usual injunction suit brought by a railroad against the United States to set aside an order of the Commission reducing

rates. In such case, however, the Government's interest as a shipper is subordinate to its broader interest as representing the general shipping public. In addition, the fixing of rates is commerce regulation and it does not follow from the fact that the United States has consented to be sued as to rate orders, even though remotely involving its proprietary interests as a shipper, that it has consented generally to be sued in claims directly and substantially involving its monetary and proprietary interests.

Moreover the Urgent Deficiencies Act, in transferring the jurisdiction of the Commerce Court to the District Courts, added special venue provisions, obviously primarily directed to the convenience of shippers, and provisions for hearings before three judges, expedited procedure and direct appeal to the Supreme Court. It seems clear that these provisions were intended only for the review of matters arising under the Interstate Commerce Act. That a jurisdiction of this nature should not be availed of for other purposes, thereby placing unnecessary demands on such special procedure and privilege of direct appeal, is indicated in *Moore, Insurance Commissioner* v. *Fidelity & Deposit Co.*, 272 U. S. 317, and *Smith* v. *Wilson*, 273 U. S. 388.

3. The court's jurisdiction under the Urgent Deficiencies Act to enjoin orders of the Commission bears a reciprocal relationship to its jurisdiction to enforce such orders, and the Commission's certificate, directed to the Secretary of the Treasury rather than to the carriers, and being, moreover, for the payment of money, clearly falls outside the enforcement side of the court's special jurisdiction over regulatory orders and therefore should be reciprocally excluded from the enjoining side of the jurisdiction.

The lack of relationship between action of the Commission taken under section 209, and regulatory action reviewable under the Urgent Deficiencies Act, is further demonstrated by the fact that a reciprocal relationship is held to exist between the court's jurisdiction to enjoin and its jurisdiction to enforce orders of the Commission.

In *Illinois Central R. R. Co.* v. *U. S.*, 244 U. S. 81, there was involved an order of the Commission assigning the case for hearing over the objections of the carrier that the Commission lacked jurisdiction of the subject matter. The court, in holding that the order was not reviewable, called attention to the fact that jurisdiction under the Urgent Deficiencies Act is two-sided, the Court having jurisdiction to enforce orders of the Commission on the one hand and having jurisdiction to set aside orders of the Commission on the other hand. Based on the reasoning in the *Procter & Gamble Case, supra,*

it was held that since attendance at a hearing is not the kind of thing that could be compelled, the order of the Commission assigning the case for hearing was not enforceable, and, since it was not enforceable against the carrier, reciprocally it was not enjoinable at the instance of the carrier. At pages 88, 89, the court in applying the principles of the *Procter & Gamble Case*, said:

> * * * Considering the first and second subdivisions of section 1, (section 207 of the Judicial Code,) which deals with the jurisdiction of the Commerce Court, it was said that the first " provides for the enforcement of orders, that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission;" and that the second, "dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph. In other words, by the cooperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order." Other provisions of the act were said to be as convincing.
>
> It will thus be observed, as said by counsel for the Commission, "The power of a court

> 'to stay the enforcement of an illegal order' is, in a sense, reciprocal to its power to enforce compliance with an order of the Commission, 'if lawful.' And just as the district court would have been powerless in the instant case, to compel the appellee to attend the hearing with respect to which the notice had been given, so also was it without lawful authority to annul that notice or to enjoin the Commission from proceeding in the premises." And again, as other counsel say, the alleged order was nothing more than notice of a hearing which the railroad company might attend or not, as it saw fit.

Under the Commerce Court and Urgent Deficiencies Acts the court's jurisdiction to enforce is confined to—

> All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture and penalty, or by infliction of criminal punishment of any order of the Interstate Commerce Commission other than for the payment of money.

The Commission's certificate herein involved, being for the payment of money, would appear to be expressly excluded from the enforcement side of the court's special jurisdiction. Moreover, although shippers may doubtless sue to enforce orders in which they are interested, it is apparent that in large part it is intended that suits shall be brought by the United States on behalf of the general public.

As evidencing this section 4 of the Commerce Court Act reads as follows:

> SEC. 4. That all cases and proceedings in the Commerce Court which but for this Act would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved.

In this connection the historical reasons for excluding orders for the payment of money from the court's special jurisdiction are illuminating. When that jurisdiction was first created the only orders for the payment of money were for damages on account of violations of the Act. Clearly, the reasons for the United States taking the initiative in enforcing administrative orders of the Commission for the regulating of rates and services in the interest of the general public are not applicable to the Commission's order or award of damages, which is of interest, not to the general public, but only as between individual carriers and shippers. And, accordingly, the court's primary jurisdiction in respect of the purely legal question of damages is recognized and shippers are left to bring their own court actions wherein the Commission's award is of *prima facie* force only. Similarly, it would involve a strained construction to assume that the United States might take steps to enforce the Commission's certificate against the Secretary of the

Treasury, thereby aligning the public on the side of the carriers in the carrier's claim against the public's own funds and, accordingly, if the doctrine of reciprocity as between the enforcing and enjoining sides of the court's jurisdiction is to be observed, it would seem that the carrier may not resort to the Urgent Deficiencies Act to enjoin the Commission's certificate.

Appellant asserts that *Dayton Goose Creek Ry. v. United States*, 263 U. S. 456, involving the Commission's circular orders requiring reports pertaining to excess income susceptible to recapture, is a complete answer to the position that money orders are not subject to the injunctive side of the court's jurisdiction. But even disregarding the fact that the opinion in that case states at page 475 that the appellees were not relying upon the jurisdictional question but desired a decision on the merits, it will be seen that the order in respect whereof the court there assumed jurisdiction was not an order for the payment of money. It is true that the circulars, in addition to ordering that reports be made, contained an admonition to pay, the excess income shown, but that this was not regarded as a real requirement or order is shown by the fact that counsel for the Commission took the position (p. 465) that the orders were merely a procedural step and did not require the railroad to pay into a reserve fund or to the Commission any sum of money, and by Chief Justice Taft's statement in respect of this feature of the order. At page 475 he said:

> The Commission requested it to report what provision it had made for setting up a fund to preserve one-half of these excesses, and to remit the other half to the Commission.

If, then, the Commission's instructions to pay the excess shown were merely requests they could not have been orders, enforceable or entailing penalties, and since the decision should be interpreted consistently with other decisions of the court under the Urgent Deficiencies Act it follows that the court assumed jurisdiction solely on the basis that the only real requirement in the circulars was for reports pertaining to excess income. Furthermore the Transportation Act, while excluding the guaranty section, specifically made the recapture clause a part of the Interstate Commerce Act.

4. The fact that the guaranty section is in substance a gratuity and the fact that its terms, agreed to by the carriers, clothe the Commission with broad discretion in the premises without provision for appeal from its determination rebut any possible implication that the Government intended that the Urgent Deficiencies Act should constitute its consent to be sued in respect of the amount of its gift.

Payments made under section 209 of the Transportation Act should in no way be confused with the just compensation due the carriers for their taking and use during the war emergency period. Such compensation was provided for by the Federal Control Act, containing provisions for its determina-

tion, if not voluntarily agreed upon, by a board of referees with privilege of appeal to the Court of Claims. By reference to section 3 of the standard contract between appellant and the Director General (R. 46, 47), it will be seen that the appellant accepted the amounts named in the contract in full discharge for compensation on account of the taking and use of its properties. This Court has held, in a case involving grants to carriers under section 204 of the Transportation Act, above mentioned, that a similar waiver contained in the standard contract made with short-line carriers constituted a complete waiver of compensation other than that named in the contract. *St. Louis, Kennett & Southeastern R. R. Co.* v. *U. S.*, 267 U. S. 346. Congress did not therefore enact section 209 in recognition of any constitutional or legal obligation but solely as a manifestation of its desire to deal generously and in all fairness with the carriers. This section must, we think, be regarded as a gratuity in substance for, although the carrier agreed to pay to the United States sums earned in excess of the guaranty amount, it did not have to file acceptance until fifteen days following the commencement of the six-months guaranty period, at which time, in view of the approximately $12,000,000 deficit under the guaranty that was in fact sustained for that short period, it must have been readily forseeable that no excess over the guaranty payable to the Government would be earned. On the other hand,

if the offer made by the United States in this section and its acceptance by the carrier is regarded as effecting a contract supported by legal consideration consisting of the very remote possibility that earnings might be precipitately and unexpectedly enlarged during the six-month period to such extent that an excess payable to the Government would be shown, still the situation is not changed, for the terms of the guaranty, agreed to by both parties, clothe the Commission with broad discretion in the premises. The basic amount of the guaranty, it is true, is fixed by statute, in that it is that the carrier's net railway operating income for the guaranty period shall not be less than one-half its annual contract compensation for the control period, (Sec. 209(c) (1)) but the determination of the proper allowances in maintenance expenditures and other operating expenses in arriving at the amount by which the net income in fact earned during the guaranty period was less than the guaranteed net income is left to the administrative judgment of the Commission. For example, in respect of maintenance expenditures, the Act, while directing the Commission to follow, in so far as applicable, the carrier's federal control contract, nevertheless provides that the allowance shall not be more than the amount fixed by the Commission (Sec. 209(f)(3)) and in respect of other operating expenses and operating revenues it directs the Commission to require the elimination and restatement thereof to the extent necessary to correct and exclude any dis-

proportionate or unreasonable charge to expenses or revenues (Sec. 209 (f)(5)). The section contains no provision for appeal from or review of the Commission's determination.

In view of the rule that the United States may not be sued without its consent, the intent to consent that the amount of its gift should be subject to court review should not be read into the statutes; the most that can be said is that mandamus would lie against the Commission or the Secretary of the Treasury if they had refused to take action in respect of duties plainly imposed upon them by the Act, or if action taken was shown to be clearly capricious and arbitrary. *Work* v. *Rives,* 267 U. S. 175, 182.

II

THE GOVERNMENT'S CONSENT TO THIS SUIT CAN NOT BE FOUND IN ANY OTHER LEGISLATION PROVIDING FOR SUITS AGAINST THE UNITED STATES IN THE DISTRICT COURTS

Appellant's brief cites *O. R. & N. Co.* v. *Fairchild,* 224 U. S. 510, and *N. P. Ry.* v. *Department of Public Works,* 268 U. S. 399, as evidencing that, even if section 209 is not part of the Act to Regulate Commerce and the subject matter thereof is not commerce regulation, reviewable under the Urgent Deficiencies Act, the right to injunction nevertheless applies in a proper case to any unlawful order of the Commission.

As above stated, this suit does not belong to that class of suits which have been held not to be suits against the Government, although brought against

agencies or officials of the Government, and although the agency or official committing the wrong assumed to act on behalf of the Government. In the present suit the United States is named as defendant and the public moneys are involved. The suit is therefore against the United States, both in form and in substance.

While the *Tucker Act* authorized suits against the United States in the district courts, founded upon any law of Congress, or contracts, express or implied, such suits are limited by that Act to claims not exceeding $10,000 (36 Stat. 1093; Judicial Code, section 24(20)) and have been construed to be confined to actions wherein the relief prayed for is by way of money decree or judgment. *United States* v. *Jones,* 131 U. S. 1; *District of Columbia* v. *Barnes,* 197 U. S. 146, 152. The relief asked in this suit is not for a money decree but is in equity for an injunction against the Commission's certificate and against officials of the United States. Even if the prayer were for a money decree it is clear that the amount of the claim would greatly exceed $10,000.

We respectfully submit that the decree of the District Court should be affirmed.

DANIEL W. KNOWLTON,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 612.—October Term, 1927.

Great Northern Railway Co., Appellant, *vs.* The United States of America et al.	Appeal from the District Court of the United States for the District of Minnesota.

[May 14, 1928.]

Mr. Justice Brandeis delivered the opinion of the Court.

This suit, under the Act of June 18, 1910, c. 309, 36 Stat. 539, as amended by Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, was brought by the Great Northern Railway Company against the United States, in the federal court for Minnesota, to annul two certificates issued by the Interstate Commerce Commission to the Secretary of the Treasury, pursuant to § 209 of Transportation Act, 1920, February 28, 1920, c. 91, 41 Stat. 456, 464-468, as amended by Act of February 26, 1921, c. 72, 41 Stat. 1145. The Company claims that these certificates are orders of the Commission; that they were issued without authority of law; and that they are void. The United States and the Commission moved to dismiss on the ground that the certificates sought to be annulled are not orders of the Commission within the meaning of the Commerce Court and Urgent Deficiencies Acts; and that the United States had not consented to be sued. The case was heard before three judges who dismissed the bill for want of jurisdiction. 22 F. (2d) 865. Whether they erred in so doing is the only question presented by the appeal.

Certificates under § 209 are an incident of the termination of the federal control of the railroads on March 1, 1920. They are provided for in Title II of Transportation Act, 1920. By § 209(c) of that Act, the United States guaranteed to each company that its railway operating income for the following six months should be not less than one-half of the amount of the annual compensation to which it was entitled during the period of federal control. Paragraph (g) provided that: "The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several

amounts necessary to make good the foregoing guaranty. . . ." Paragraph (h) provided for the issue, during the guaranty period, of certificates for payment on account, if the carrier furnishes an adequately secured contract to repay to the United States any amount received in excess of that which shall be finally determined as the sum to which the carrier is entitled under the guaranty. Section 212, added by the Act of February 26, 1921, c. 72, 41 Stat. 1145, provided for payments on account after the expiration of the guaranty period, the Commission being authorized to "make its certificate for any amount definitely ascertained by it to be due, and . thereafter in the same manner make further certificates, until the whole amount due has been certified." Upon receipt of certificates the Secretary of the Treasury was directed "to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty."

Upon certificates of the Commission issued to the Secretary of the Treasury under paragraph (h), he paid the Company $6,500,000 in 1920. Upon certificate issued under § 212, he paid it $6,000,000 in 1921. Several years later, in the course of the proceedings for final settlement of the amount due the Company under § 209, the Commission issued to the Secretary of the Treasury the two certificates here in suit. Only the second of them is of importance. It certified that the total amount required to make good to the Company the guaranty provided for in § 209 was $11,170,214.02. *Guaranty Settlement with Great Northern Railway Co. et al.*, 99 I. C. C. 231; 111 I. C. C. 318. As the Secretary of the Treasury had paid $12,500,000 to the Company, he demanded reimbursement, as an overpayment, of $1,329,785.98, being the difference between the aggregate amounts received by the Company and the total amount certified as payable under the guaranty. Pending settlement of that claim, the Government withheld payment to the Company of all amounts accruing for transportation services, but the payments were resumed upon the Company's deposit of Liberty bonds as collateral. Thereupon, this suit was brought by the Company to annul the certificates and to restrain the Government from enforcing its claim by sale of the Liberty bonds or otherwise.

The function imposed upon the Commission by § 209 is solely that of determining the amount required to make good the Government's guaranty. It is not an exertion of the delegated power to regulate interstate commerce. It is an incident of the World War

—a temporary, non-recurrent task, which might appropriately have been performed for the Treasury by its Comptroller or auditors, or by other trusted official. Congress selected the Commission for this service, doubtless, because of its special fitness. For the Commission had knowledge of railroads and experience in railroad accounting; it had the custody of the records of railroad operations; and its staff was competent to make speedily the necessary investigations.

Transportation Act, 1920, did not confer upon the Commission power to order anything in connection with the issue of the certificates. There is in the certificates no direction, no word of command. They are the recital of a finding of fact. They are addressed to the Secretary of the Treasury; and only to him. The form of the certificate expresses appropriately the character of the service performed by the Commission. The final certificate does not purport to declare that the carrier is indebted to the United States in any sum. It states the total amount required of the United States to make good the guaranty and the aggregate amount theretofore certified. It discloses the facts, but does not certify that there was an overpayment.[1] Congress distinguished

[1]The certificate reads (111 I. C. C. 318, 338-339):

"TO THE SECRETARY OF THE TREASURY OF THE UNITED STATES: . . .

"2. The commission has ascertained, and hereby certifies to the Secretary of the Treasury, that the amount necessary to make good to said Great Northern Railway Company the guaranty provided by section 209 of the transportation act, 1920, is $11,170,214.02; . . .

"3. The commission has heretofore certified to the Secretary of the Treasury as advances under section 209(h) to said Great Northern Railway Company an aggregate amount of $6,500,000, as follows:

Certificate No. 65, June 25, 1920	$3,000,000
Certificate No. 225, August 31, 1920	2,000,000
Certificate No. 276, November 4, 1920	1,500,000

and as partial payment to said Great Northern Railway Company under section 209(g), as amended by section 212, an amount of $6,000,000 on March 1, 1921, under certificate No. A-329.

"4. The commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the transportation act, 1920.

"Dated this 8th day of June, 1926."

The two certificates here involved deal with the same subject matter. The issue of the second canceled the earlier one, which differed as to the amount due to the Company and which had contained a certification of the fact of overpayment. 99 I. C. C. 231, 234, 235.

clearly, in framing Transportation Act, 1920, between provisions which were amendments of the Interstate Commerce Act and those which, while relating to railroads, were not. The amendments were grouped under Title IV. The provisions here involved, which related solely to the termination of federal control were grouped under Title II. Those which provided for the Railroad Labor Board under Title III. Because issuing certificates is not a part of the Commisson's delegated power to regulate commerce and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality or correctness of its action in doing so.

The Company points out that the action of the Commission here in question was affirmative, not negative, as in *Proctor & Gamble Co.* v. *United States,* 225 U. S. 282; that it relates to a matter of substance and not merely to a step in procedure, as in *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82; that it determines legal rights and obligations, and is not simply the tentative or final report of an investigation, as were the orders which we declined to review in *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438, and *United States* v. *Los Angeles & Salt Lake R. R. Co.,* 273 U. S. 299; and that its being entitled as a certificate rather than as an order is not fatal to the equity jurisdiction of the District Court under the Urgent Deficiencies Act. Compare *Chicago Junction Case,* 264 U. S. 258, 263; *Colorado* v. *United States,* 271 U. S. 153; *Home Furniture Co.* v. *United States,* 271 U. S. 127. But these considerations are irrelevant. For the inapplicability of the special remedy given by the Urgent Deficiencies Act is due to the fact that the certificate deals with a subject matter not within the scope of the Commission's duty to regulate commerce, and hence, not within the purview of that remedy. In this respect, among others, it differs from the order involved in *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456.

It is said that, unless this remedy is available, the Company may be without redress. The argument is that the determination by the Commission of the amount required to make good the guaranty, may be likened to an award of arbitrators; that the ground of the attack upon the certificates is that they were made under a mistake of law; and that an award can be set aside for mistake of law only in equity, *Hartford Fire Insurance Co.* v. *Bonner Mercantile Co.,* 44 Fed. 151; *McLaurin* v. *McLauchlin,* 215 Fed. 345.

We have no occasion to enquire whether a remedy at law or some other remedy in equity is available. The mere fact that the certificate may be conclusive, if it be a fact, would not entitle the Company to a judicial review. Compare *United States* v. *Babcock*, 250 U. S. 328, 331; *Work* v. *Rives*, 267 U. S. 175. We find no reason for thinking that because Congress confided to the Commission the task of certifying the amount to be paid to carriers from the public treasury, as an incident to the World War, it thereby consented that the United States should be sued in the special proceeding in equity devised long before to control the Commission's execution of its regular functions in enforcing the Interstate Commerce Act.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.